LIBRARY SUPREME COURT, U. S.

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No.....

THE MUNICIPAL COURT OF THE EAST LOS ANGELES JUDICIAL DISTRICT, County of Los Angeles, State of California, *Petitioner,* vs. JAMES PERRINE, *Respondent.*	No. L.A. 29852
THE MUNICIPAL COURT OF THE EAST LOS ANGELES JUDICIAL DISTRICT, County of Los Angeles, State of California; THE MUNICIPAL COURT OF THE EL MONTE JUDICIAL DISTRICT, County of Los Angeles, State of California, and THE MUNICIPAL COURT OF THE INGLEWOOD JUDICIAL DISTRICT, County of Los Angeles, State of California, *Petitioners,* vs. JOANNE L. BAKER, RANDY LEE GRAVES, ELLIS V. SANFORD, JOSEPH ARLEO, NATHAN GREENBERG, AL MORRISON, and SHELDON MILLER, *Respondents.*	No. L.A. 29860

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1722

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

OPENING STATEMENT

In this petition for writ of certiorari we seek review of two cases decided by the Supreme Court of the State of California pursuant to Paragraph 5 of Rule 23:

"5. Where several cases are sought to be reviewed on certiorari to the same court that involve identical or closely related questions, it shall suffice to file a single petition for writ of certiorari covering all of the cases."

(a) The opinion in both cases are appended to this petition as provided in subparagraph (i) of paragraph 1 of Rule 23 and are reported, as follows:

Perrine v. Municipal Court et al. (1971) 5 Cal. 3d 656, 97 Cal. Rptr. ____, 488 P. 2d ____ (Appendix "A")

Baker et al. v. Municipal Court et al. (1971) 5 Cal. 3d 669, 97 Cal. Rptr. ____, 488 P. 2d ____ (Appendix "B").

(b) *Grounds upon which Certiorari is Sought.*

(i) Both cases were decided by opinions both filed on September 3, 1971, and were entered on that date.

(ii) There has been no petitions for or orders concerning a rehearing or extension of time in which to seek certiorari in either case.

(iii) In both cases we rely upon the following portion of 28 U.S.C. §1257:

"Final judgment or decrees rendered by the highest court of a State in which a decision may be had, may be reviewed by the Supreme Court as follows:

* * *

"(3) By writ of certiorari * * * where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution * * * of the United States * * *."

The words "State statute" include a county ordinance. *Jamison v. State of Texas* (1943) 318 U.S. 413 at 414;[1] *John P. King Manufacturing Co. v. City Council of Augusta* (1928) 277 U.S. 100 at 114.[2]

(c) *The Questions present for Review.*

The Questions presented for Review are:

1. Does an ordinance requiring an annual regulatory license to conduct a commercial bookstore which ordinance contains no provision permitting the contents of any book offered for sale to be examined in considering whether to grant or deny the license, regulate a First Amendment Activity?

2. Is a provision in such an ordinance that the Commission may grant such a license if, within the last five years the applicant has not been convicted of violating certain specified state penal statutes relating to obscenity or pornography or violated such statutes valid?

3. Is such ordinance valid if it be assumed that it regulates a First Amendment activity?

(d) *Constitutional Provisions, Statutes, and Ordinances which the Case Involves.*

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[1] 63 S.Ct. 669 at 671, 87 L.Ed. 869 at 871.
[2] 48 S.Ct. 489 at 494, 72 L.Ed. 801 at 810.

This case involves the validity of Ordinance No. 5860 of the County of Los Angeles which requires a license in order to conduct the business of a bookstore, under the following portion of the First Amendment of the Constitution of the United States (made applicable to the States by the Fourteenth Amendment) which reads:

> "Section 1. Congress shall make no law * * * abridging the freedom of speech, or of the press * * * ."

This case involves Sections 3, 13, 51, and 329.2 of Ordinance No. 5860, the County License Ordinance and Sections 7, 321, 322, and 329.4 of that same ordinance as these latter sections read prior to January 8, 1971. (Subsequent amendments to Sections 7 and 321 are immaterial. Subsequent amendments to Sections 322 and 329.4 are explained *infra.*)

Section 3 reads:

> "Sec. 3. *Severance Clause.* If any provision of this ordinance, or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance and the application of such provision to other persons or circumstances, shall not be affected thereby."

The material portion of Section 51 reads:

> "Sec. 51. *Period of License.* All licenses herein provided for may be issued for any period not exceeding one year and not less than the period for which a license fee is fixed * * *."

The other sections referred to above are quoted in Footnotes 3, 1, and 2 respectively of the opinion in *Perrine v. Municipal Court, supra* (1971) 5 Cal. 3d 656 at 659, App. "A" pp 1-3.

The California Courts take judicial notice of the ordinances of the County of Los Angeles. State Evidence Code §§ 200, 452; *Jordan v. County of Los Angeles* (1968) 267 Cal. App. 2d 794 at 798, 75 Cal. Rptr. 516. On review, this Court also does so. *United States v. Pink* (1941) 315 U.S. 203 at 221;[3] *Adam v. Saenger* (1937) 303 U.S. 59 at 63.[4]

The statutes referred to in Section 329.4 of the ordinance as it read prior to March 26, 1971 and Section 82.7 effective on that date (Appendix "D") are set forth in Appendix "C". The statute most pertinent is subsection (a) of Section 311.2 of the California Penal Code as amended by Calif. Stats. 1969, chap. 249, page 598 which subsection reads:

> "311.2. (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor."

Sections 16100 and 16240 both added to the Business and Professions Code by Calif. Stats. 1941, chap.

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[3]62 S.Ct. 552, 86 L.Ed. 796 at 813.
[4]58 S.Ct. 454, 82 L.Ed. 649 at 652.

61, page 717 at pages 718 and 720 respectively, read:

> "16100. The boards of supervisors, in their respective counties, may in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, license any kind of business not prohibited by law, transacted and carried on within the limits of their respective jurisdictions, including all shows, exhibitions, and lawful games, and may fix the rate of license fee and provide for its collection by suit or otherwise.
>
> "16240. Every person who commences or carries on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required by any law of this State, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor."

Section 82.7 as added to, and Section 322 and 329.4 as amended of, Ordinance No. 5860 by County Ordinance No. 10,217 adopted February 23, 1971 and effective on March 26, 1971 are set forth in Appendix "D". The questions discussed in this petition are also material as to the ordinance as so amended.

The State Supreme Court granted a writ of prohibition in each case pursuant to the following portion of Section 10 of Article VI of the State Constitution:

> "Sec. 10. The Supreme Court, courts of appeal * * * have original jurisdiction * * * in proceedings for extraordinary relief in the nature of * * * prohibition."

(e) *Statement of the Case.*

Respondent James Perrine applied for a bookstore license but the license was denied because he had been convicted of a violation of Section 311.2 of the Penal Code Sale, (possession, etc., of obscene matter). *Perrine v. Municipal Court, supra* (1971) 5 Cal. 3d 656 at 660 (App. "A" p. 3).

Respondent Joanne Baker was denied a license because she had sold an obscene book (a violation of Section 311.2 of the Penal Code). (p. 2 of Petition in *Baker v. Municipal Court supra*).

Neither respondent Randy Lee Graves nor Ellis V. Sanford ever applied for a license. (p. 3 of Petition in *Baker v. Municipal Court supra*).

All conducted bookstores without the required licenses in the unincorporated territory of the County. All were arrested and brought to trial in one of the petitioner courts. The Supreme Court granted writs of prohibition prohibiting the trial of any of these cases on the ground that the portions of the License Ordinance relating to bookstores were unconstitutional because:

1. They provided that the Public Welfare Commission *may* grant a license if the specified requisites were found. *Perrine v. Municipal Court, supra* (1971) 5 Cal. 3d 656 at 662 (App. "A" p. 6).

2. Conviction of a Violation of Section 311.2 of the Penal Code is not an adequate ground upon which to

deny a license. *Perrine v. Municipal Court, supra* (1971) 5 Cal. 3d 656 at 665 (App. "A" p. 12).

3. "* * * Finally, the commission is not limited in denying a license on the basis of a conviction of any of the enumerated crimes, but must determine whether the applicant or any of his associates have committed any of those crimes, a determination which may be fraught with uncertainty, particularly in the area of crimes involving obscenity." *Perrine v. Municipal Court, supra* (1971) 5 Cal. 3d 656 at 663 (App. "A" p. 8).

Effective March 26, 1971 the License Ordinance was so amended as to eliminate the first objection and to provide that bookstore license *shall* be granted or denied as provided in Section 82.7. The other portions to which the California Supreme Court objected remained in effect. (App. "D".)

(f) *When Federal Question First was Raised.*

In *Perrine v. Municipal Court, supra,* the petitioner first filed a petition for a writ of prohibition in the California Court of Appeal for the second appellate district, No. 37605, on December 3, 1970. In this petition the petitioner (respondent here) raised all of the contentions discussed in the opinion of the State Supreme Court. This petition was denied without opinion on December 8, 1970. Mr. Perrine then filed a petition for hearing in the State Supreme Court which was granted on January 28, 1971.

In *Baker et al., v. Municipal Court, et al., supra,* the petitioners (respondents here) filed their petition directly in the State Supreme Court on or about February 11, 1971, referring to, and incorporating by reference their Points and Authorities in, *Perrine v. Municipal Court, supra.*

(h) *Amplification of Reasons for Allowance of Writ.*

I

THIS CASE INVOLVES IMPORTANT QUESTIONS OF LAW OF NATIONWIDE IMPACT.

We submit that these cases satisfy both requirements of (a) of 1 of Rule 19:

> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

We have found no reported decision of this Court as to the validity of licensing provisions for commercial bookstores or theatres (an analogous occupation). For reasons to be given hereafter consorship decisions are not in point.

The premises upon which the majority relied, however, in both cases, are directly contrary to a number of decisions of this Court.

The impact of this decision in the County of Los Angeles can be seen from the fact that on Monday October 4, 1971 in a single judicial district of the county twenty-one cases were on the calendar where the defendants were charged with operating bookstores without a license. The opinion of the Court, however, under the doctrine of *stare decisis* will affect many other licenses, not only in the County of Los Angeles but in all counties and cities throughout the State. Not only in California but in other states will the case be cited as persuasive authority. For example, a license case upon which the majority rely, *Burton v. Municipal Court* (1968) 68 Cal. 2d 684, 68 Cal. Rptr. 721, 441 P. 2d 281 was cited and followed by *Soof v. City of Highland Park* (1971) 30 Mich. App. 400, 186 N.W. 2d 361 at 365.

There is the obvious necessity in the complex society of today to provide protection to the public from the practice and activities of incompetent or dishonest persons where damage to the public health, saftey, welfare, or morals could occur and where the public has no relatively easy way of determining competency, or honesty, itself. Licensing for regulation has proved a most effective tool.

The great extent of statutes and ordinances licensing occupations and other activities for the purpose of regulation can be seen from the numerous reported cases found in 51 Am. Jur. 2d 19, Licenses § 14; 53 C.J.S. 478, Licenses § 10; and 3 Shepard's Ordinance Law Annotations pp. 332-439.

A great deal of the utility of such licensing provisions is now threatened by the decisions the review of which we seek.

II

OPERATION OF A COMMERCIAL BOOKSTORE IS NOT A FIRST AMENDMENT ACTIVITY.

In *Perrine v. Municipal Court et al., supra* (1971) 5 Cal. 3d 656 at 661 (App. "A" p. 5) the court said:

> "Although the activity of selling or distributing books is not exempt from reasonable regulation, it is entitled to First Amendment protection (*Smith v. California* (1959) 361 U.S. 147, 150;[5] see *Near v. Minnesoto* (1930) 283 U.S. 697, 720;[6] *Burton v. Municipal Court* (1968) 68 Cal. 2d 684, 689).[7] * * * *"

This may be true where a particular book or set of books expresses the views of the seller or distributor of the book or books and the dissemination of those views is his purpose in selling or distributing them. Here, however, the State Supreme Court has applied that statement to the commercial sale of books where the proprietor of the bookstore has no interest whatever in the contents of any of the books, does not desire to convey any message to his customers, and sells only because of the profit involved. The two decisions

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[5] 80 S.Ct. 215, 4 L.Ed.2d 205 at 209, rehearing denied 361 U.S. 950, 80 S.Ct. 399, 4 L.Ed.2d 383.

[6] 51 S.Ct. 625, 75 L.Ed. 1357 at 1369-1370.

[7] 68 Cal.Rptr. 721, 441 P.2d 281.

of this Court cited do not support the statement as so applied. Insofar as *Burton v. Municipal Court, supra*[7] would support the statement as so applied it is erroneous for reasons to be given hereafter, and, to that extent should be overruled.

Smith v. California, supra, was an appeal from a conviction for a violation of a city ordinance which makes it unlawful "for any person to have in his possession any obscene or indecent writing, [or] book * * * [i]n any place of business where * * * books * * * are sold or kept for sale."

In that case the prosecution was based on the contents of the book itself.

So also, in *Bantam Books v. Sullivan* (1963) 372 U.S. 58 at 66,[8] cited at 5 Cal. 3d at 665, App. "A" p. 11, the regulation attempted was of the content of the books.

In *Board of Education v. Barnette* (1943) 319 U.S. 624 at 639[9] cited in 5 Cal. 3d 656 at pp. 664, 665, App. "A" p. 11 a requirement that pupils salute the flag was held to violate free speech because "* * * the flag salute is a form of utterance. * * *"[10]

On the contrary Ordinance No. 5860, the County License Ordinance neither regulates nor attempts to regulate the content of any book. Neither does it prohibit, regulate, or attempt to do so, the sale or distri-

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[7]83 S.Ct. 63, 9 L.Ed. 2d 58, 59.

[8]83 S.Ct. 1178, 87 L.Ed. 1628 at 1638, 147 A.L.R. 674.

[9]319 U.S. at 632, 63 S.Ct. 1178, 87 L.Ed. 1628 at 1634, 147 A.L.R. 674 at 678.

bution of any particular book. It requires a license to engage in the business of selling books. The person engaged in that business is in the business of selling commodities. He is not interested in the content of any particular book. He is not attempting to disseminate any message. All he is interested in is the sale of a commodity at a profit, a perfectly legitimate and even commendable endeavor but not the exercise of free speech.

It was contended in *Associated Press v. United States* (1945) 326 U.S. 1, that application of the Sherman Anti-Trust Act to newspapers would restrict the freedom of the press. In holding to the contrary this Court said at page 7:[11]

> " * * * That doctrine, as related to this case, provides protection for utterances themselves, so that the printed or spoken word may not be the subject of previous restraint or punishment, unless their expression creates a clear and present danger of bringing about a substantial evil which the government has power to prohibit. * * * Formulated as it was to protect liberty of thought and of expression, it would degrade the clear and present danger doctrine to fashion from it a shield for business publishers who engage in business practices condemned by the Sherman Act. * * * "

For similar reasons this Court held in *Mabee v. White Plains Publishing Company* (1946) 327 U.S.

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[11] 65 S.Ct. 1416, 89 L.Ed. 2013 at 2023.

178 at 184[12] that application of the Fair Labor Standards Act to newspapers did not restrict the freedom of the press.

In *National Broadcasting Co., Inc. v. United States* (1943) 319 U.S. 190 at 226,[13] this Court said:

> " * * * But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic, or social views, or upon any other capricious basis. If it did, or if the Commission by these regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. * * * "

Near v. Minnesota (1931) 283 U.S. 697 at 720[14] cited in 5 Cal. 3d 656 at 661 and 665, App. "A" pp. 5, 11, by the mapority is distinguished in Footnote 3 of the dissenting opinion of Justice Burke at page 668, App. "A" p. 17:

> "3. Near v. Minnesota, *supra,* 283 U.S. 697, cited by the majority, does not compel a contrary conclusion. In *Near,* the offending ordinance permitted public officials to take legal proceedings against the owner or publisher of a newspaper upon a charge of publishing scandalous and defamatory matter, and to obtain an order suppressing further publication of the newspaper. The ordinance was not restricted to persons *convicted* of obscenity offenses, but extended to persons

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[12]66 S.Ct. 511, 90 L.Ed. 607 at 613.
[13]63 S.Ct. 997 at 1014, 87 L.Ed. 1344 at 1368.
[14]51 S.Ct. 625, 75 L.Ed. 1357 at 1369.

> *charged* with promoting scandal and libel. (See p. 713.)[15] Moreover, the ordinance in *Near* operated as a prior restraint upon the publication of a newspaper; its effect upon the dissemination of ideas was direct and substantial. On the other hand, the instant ordinance does not restrain publication or distribution of any particular book or magazine; it simply denies those persons convicted of certain criminal offenses a license to operate a bookstore."

In *Burton v. Municipal Court, supra* (1968) 68 Cal. 2d 684 at 694-695, 68 Cal. Rptr. 721, 441 P. 2d 281 the court said:

> "In another case the board declined to grant a permit to exhibit a play on the ground that the performance would not comport with the 'peace, health, safety, convenience and general welfare of the public' because, assertedly, the play was obscene as the term is defined in the Penal Code. (Pen. Code, § 311.)" See App. "C".

Here was a prohibition of the play itself. Insofar, however, as the opinion might be construed to hold that the operation of a commercial motion picture theatre where neither the operator nor the public authorities are interested in the content of any of the films shown is an exercise of the right of free speech it is contrary to the decisions of this Court heretofore cited. We submit that the reasoning of the Supreme Judicial Court of Massachusetts in *Mosey Cafe, Inc. v. Licensing Board for City of Boston* (1958) 338

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[15]51 S.Ct. 625, 75 L.Ed. 1357 at 1366.

Mass. 199 at 204, 154 N.E. 2d 585 at 589 is sound and leads to the correct conclusion, where, concerning a statute requiring an annual license to carry on a concert, dance, exhibition, cabaret or public show of any description, the court said:

> "* * * * Section 183A is not a censorship statute. We are of opinion that the purpose of § 183A and of the ordinance is the preservation of public order at public entertainments. We fail to perceive any prior restraint or any attempt to impinge upon the constitutional guaranties of free speech and freedom of the press. We regard such cases as *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098, and *Brattle Films, Inc. v. Commissioner of Public Safety,* 333 Mass. 58, 127 N.E. 2d 891, as inapplicable to the statute and ordinance rightly construed. * * *
>
> "The license by the express term of § 183A is granted on an annual basis. Not only would it be impractical and beyond all reasonable possibility to pass upon the entire next year's programs in granting a license, but there is no suggestion that the board ever attempted to use the license requirement as a cloak for exercising as to even one day's program a censorship power which the statute does not confer."

A bookstore license, also, is issued on an annual basis. While no term is specified in Section 321 of the ordinance Section 51 of the ordinance begins:

> "Sec. 51. *Period of License.* All licenses herein provided for may be issued for any period not exceeding one year * * *."

III

CONVICTION OR COMMISSION OF CRIME IS A VALID GROUND OF DENIAL.

A. A Denial of a License does not Impair the Right of Free Speech.

Since, as we have shown, *supra,* the operation of a commercial bookstore is not an exercise of the right of free speech, cases involving non-free speech occupations are in point. In *Hawker v. State of New York* (1898) 170 U.S. 189 this Court sustained the validity of a New York statute which prohibited a person convicted of *any* felony from practicing medicine, saying, at page 196:[16]

> "But if a state may require good character as a condition of the practice of medicine, it may rightfully determine what shall be evidence of that character. * * * It is not open to doubt that the commission of crime, the violation of the penal laws of the state, has some relation to the question of character. It is not, as a rule, the good people who commit crime. * * *"

So far as we can find this case has not been overruled but has been subsequently cited with approval by *De Veau v. Braisted* (1960) 363 U.S. 144 at 159-160,[17] holding valid a New York statute which barred collection from pier superintendents, hiring agents, and port watchmen of dues or other levies on behalf

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[16]18 S.Ct. 573, 42 L.Ed. 1002 at 1006.
[17]80 S.Ct. 1146, 4 L.Ed.2d 1109 at 1120.

of a union whose officers or agents had been convicted of a felony and neither pardoned nor given a certificate of good conduct, and by *Garner v. Board of Public Works of Los Angeles* (1950) 341 U.S. 716 at 722[18]

Joanne Baker was not convicted of any crime but found guilty of violating Section 311.2 of the Penal Code by the Public Welfare Commission. In the case at bench the State Supreme Court said (5 Cal. 3d 656 at 663; App. "A" p. 8):

> "* * * Finally, the commission is not limited to denying a license on the basis of a conviction of any of the enumerated crimes, but must determine whether the applicant or any of his associats have committed any of those crimes, a determination that may be fraught with uncertainty, particularly in the area of crimes involving obscenity."

If the statutes are sufficiently definite so that a state court can determine whether they have been violated (and it is not contended to the contrary) they, also, are sufficiently definite so that the Public Welfare Commission after a public hearing, which is required by Section 329.4 of the ordinance, can determine whether they have been violated.

In *Hawker v. State of New York, supra,* it was the *commission* of crime which showed bad character. The conviction was but evidence of the commission. The Public Welfare Commission may be delegated the jur-

[18] 71 S.Ct. 909, 95 L.Ed. 1317 at 1324.

isdiction to determine whether or not the applicant has committed a crime. See *Reetz v. Michigan* (1903) 188 U.S. 505 at 507.[19]

In *Gundling v. City of Chicago* (1900) 177 U.S. 183 this Court held valid an ordinance giving the mayor the power to determine whether a person applying for a license to sell cigarettes has good character and reputation and is a suitable person to be intrusted with their sale saying, at page 187:[20]

> "The ordinance in question does not grant to the mayor arbitrary power * * *. In the case at bar the license is to be issued if the mayor is satisfied that the person applying is of good moral character and reputation and a suitable person to be intrusted with the sale of cigarettes * * * ."

B. Even if the Operation of a Commercial Bookstore Involved Freedom of Speech and of the Press, Denial for Conviction or Commission of Obscenity would be Valid.

We submit that we have shown that the operation of a commercial bookstore does not involve the exercise of free speech or freedom of the press but, even if it did the ordinance would be valid. In *Perrine v. Municipal Court, supra* (1971) 5 Cal. 656 at 664, App. "A" pp. 10, 11, the court said:

> " * * * Moreover, since a denial of a license would prohibit petitioner from engaging in an ac-

[19] 23 S.Ct. 390, 47 L.Ed. 563 at 565-566.
[20] 20 S.Ct. 633, 44 L.Ed. 725 at 728.

tivity protected by the First Amendment, it could only be justified, even under a narrowly drawn ordinance, if permitting a person who had been convicted of a crime involving obscenity to operate a bookstore constituted a clear and present danger of a serious, substantive evil. (Wirta v. Alameda-Contra Costa Transit District (1968) 68 Calif. 2d 51, 60; Thomas v. Collins (1943) 323 U.S. 516, 530; Board of Education v. Barnette (1942) 319 U.S. 624, 639). No such clear and present danger appears. We cannot assume that because petitioner was once convicted of violating Penal Code section 311.2, he will violate it again, or that if he does so, criminal sanctions will not afford an adequate remedy. * * *"

This is directly contrary to the decision of this Court in *Hawker v. State of New York, supra* (1898) 170 U.S. 189 at 196:[21]

" * * * It is not open to doubt that the commission of crime, the violation of the penal laws of a state, has some relation to the question of character. It is not, as a rule, good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule, —one having no relation to the subject matter,— but is only appealing to well-recognized fact of human experience; and if it may make a violation of criminal law a test of bad character, what more

[21] 18 S.Ct. 573, 42 L.Ed. 1002 at 1006.

> conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the state? * * *"

The ordinance recognizes the possibility of repentance and rehabilitation. Former Section 329.4 and present Section 82.7 only refer to crimes committed within the last five years.

As to the necessity of showing clear and present danger, that is the same as the test that the right to vote cannot be denied unless necessary to promote a compelling state interest. *Cipriano v. Houma* (1969) 395 U.S. 701 at 704;[22] *Kramer v. Union Free School District* (1969) 395 U.S. 621 at 627.[23] Nevertheless, the right to vote can be denied by one who has committed a felony. *Gray v. Sanders* (1963) 372 U.S. 368[24] at 380; *Trop v. Dulles* (1958) 356 U.S. 86 at 96;[25] *Green v. Board of Elections* (C.C.A. 2d N.Y. 1967) 380 F. 2d 445 at 452 (Certiorari denied, 390 U.S. 1048[26]); *Upshaw v. McNamara* (C.A. 1st Mass. 1970) 435 F. 2d 1188 at 1190.

Smith v. District of Columbia Board of Education, Docket No. 70-265 (Appeal filed July 11, 1971) 40 Law Week 3050 is now pending before this Court.

As we have said before the County License Ordinance is not concerned with, and does not attempt to regulate the contents of any book sold or offfered for

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[22] 89 S.Ct. 1897, 23 L.Ed.2d 647 at 650.
[23] 89 S.Ct. 1886 at 1890, 23 L.Ed.2d 583 at 589.
[24] 83 S.Ct. 801, 9 L.Ed.2d 821 at 830.
[25] 78 S.Ct. 590, 2 L.Ed.2d 630 at 640.
[26] 88 S.Ct. 768, 19 L.Ed.2d 840.

sale in a bookstore. At the same time the County is interested in seeing to it that a person shall not operate a bookstore if, by the commission of, or conviction of, certain crimes, he is not fit to do so. The operator of a bookstore should be one who, in operating the bookstore will neither violate the state law nor encourage others to do so. As Justice Burke said, in his dissent (5 Cal. 3d at 666, App. "A" at p. 13):

> "The majority also hold that a municipality is without authority to deny a bookstore license to one previously convicted of certain crimes, including the distribution of obscene materials. It seems evident to me, however, that such authority derives from the general police power to preserve, promote and protect the public health, safety, morals and general welfare.
>
> "In his own words, James Perrine 'learned the business of selling adult material' while working in and operating a San Francisco bookstore and motion picture arcade; subsequently, he acquired his own bookstore, 'The Citadel' in Los Angeles. On July 11, 1969, Perrine was convicted for distributing obscene material (Pen. Code, § 311.2). Following the adoption of the ordinance in question, he applied for a license to operate The Citadel and another bookstore, The Arena, also in Los Angeles. He also sought a license for a picture arcade at The Citadel.
>
> "The majority confidently state that 'We cannot assume that because petitioner was once convicted of violating Penal Code section 311.2, he will violate it again . . .' To the contrary, I think

it reasonably likely that he will. An advertisement for The Citadel bookstore, in the August 1970 Los Angeles Telephone Director [sic] (Yellow Pages), page 352, openly announces: 'Erotic Action — Underground Literature — Adults Only . . . Paperbacks, Magazines, Stag Films . . .'[2] But even without considering the foregoing evidence, the commission properly denied Perrine a license to operate a bookstore."

Footnote 2 reads:

"2. We may take judicial notice of petitioner's advertisement under Evidence Code section 452, subd. (h)."

This Court also may take judicial notice of the same fact. *United States v. Pink, supra* (1941) 315 U.S. 203 at 221;[27] *Adam v. Saenger, supra* (1937) 303 U.S. 59 at 63.[28]

" * * * Obscenity is not within the scope of first amendment protection. * * * "

United States v. Thirty-Seven Photographs (1971) 402 U.S. 363 at 376;[29] *Roth v. United States* (1957) 344 U.S. 476.[30]

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[27]62 S.Ct. 552, 86 L.Ed. 796 at 813.

[28]58 S.Ct. 454, 82 L.Ed. 649 at 652.

[29]91 S.Ct. 1400 at 1408, 28 L.Ed.2d 822 at 834 (Petition for rehearing denied, 403 U.S. 924, 29 L.Ed.2d 702).

[30]77 S.Ct. 1304, 1 L.Ed.2d 1498.

IV

ONE TO WHOM THE APPLICATION OF AN ORDINANCE IS CONSTITUTIONAL CANNOT ATTACK ITS APPLICATION TO OTHERS.

The majority object to the provision in the former Section 329.4 that the Commission *may* grant a license *if it finds etc.* That, under California law, means that the Commission *must* deny a license if it cannot so find. For example, in *Johnston v. Baker* (1914) 167 Cal. 260 at 264 the court held that a statute saying that a court may dismiss an action for lack of prosecutions after two years denied to the court the power which it theretofore had possessed to dismiss an action for lack of prosecution within a shorter time, saying:

> "* * * affirmative provisions in a statute introducing a new rule imply a negative of all not within their purview."

To the same effect is *County of Orange v. Cole* (1950) 96 Cal. App. 2d 163 at 170. The majority does not repudiate this construction of the California law. In his dissent Justice Burke said (5 Cal. 3d at 666, App. "A" p. 13):

> "* * * In the instant case, however, Perrine had been convicted of a prior obscenity offense and accordingly the commission had no discretion to exercise but was required by the ordinance to deny him a license. Thus, as applied to Perrine, the ordinance was not void for lack of standards." This is consistent with the holding of this Court:

"* * * that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which it application might be unconstitutional. * * *"

United States v. Raines (1960) 362 U.S. 17 at 21.[21]

To the same effect are *Gorieb v. Fox* (1927) 274 U.S. 603 at 606;[22] and *United States v. Rutherford* (C.C.A. 2d N.Y. 1964) 332 F. 2d 444 at 446 (certiorari denied 377 U.S. 994[23])

"* * * A statute valid as to one set of facts may be invalid as to another. * * *"

Nashville, Chattanooga & St. Louis Railway v. Walters (1935) 294 U.S. 405 at 415[24] and cases cited.

In *United States v. Jackson* (1968) 390 U.S. 570 at 585[25] this Court quoted as follows from *Champlin Rfg. Co. v. Commission* (1932) 286 U.S. 210 at 234:[26]

"* * * The unconstitutionality of a part of an Act does not necessarily defeat * * * the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law. * * * "

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[21]80 S.Ct. 519, 4 L.Ed.2d 524 at 529.
[22]47 S.Ct. 675, 71 L.Ed. 1228 at 1230.
[23]84 S.Ct. 1922, 12 L.Ed.2d 1046.
[24]55 S.Ct. 486, 79 L.Ed. 949 at 955.
[25]88 S.Ct. 1209, 20 L.Ed.2d 138 at 149.
[26]52 S.Ct. 559, 76 L.Ed. 1062 at 1078, 86 A.L.R. 403 at 413.

It is *not* evident that the Board of Supervisors would not have adopted that portion of the License Ordinance relating to bookstores because of Section 3 of the ordinance which reads:

> "Sec. 3. *Severance Clause.* If any provision of this ordinance, or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance and the application of such provision to other persons or circumstances, shall not be affected thereby."

The above principles were applied in *Schacht v. United States* (1970) 398 U.S. 58 at 63.[27]

V

EVEN IF THE JUDGMENT IS NOT REVERSED THIS COURT SHOULD DECLARE THAT PORTION OF THE ORDINANCE REQUIRING A LICENSE TO BE DENIED BECAUSE OF THE COMMISSION OR CONVICTION OF OBSCENITY CONSTITUTIONAL.

Citing *Hurn v. Oursler* (1933) 289 U.S. 238 at 240,[28] this Court said, in *United States v. United States Gypsum Co.* (1947) 333 U.S. 364 at 387[29]:

> "While this issue need not be decided to dispose of this case, it seems inadvisable to leave the decision as precedent. • • •

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[27]90 S.Ct. 1555, 26 L.Ed.2d 44 at 48-49.
[28]53 S.Ct. 586, 77 L.Ed. 1148 at 1151.
[29]68 S.Ct. 525, 92 L.Ed. 746 at 761.

While both of these cases related to opinions of lower federal courts, this same doctrine has been applied to opinions of the Supreme Court of California. Both *Westbrook v. Mihaly* (1970) 2 Cal. 3d 765, 87 Cal. Rptr. 839, 471 P. 2d 487 and *Alhambra City School District v. Mize* (1970) 2 Cal. 3d 806, 87 Cal. Rptr. 867, 471 P. 2d 515, were original proceedings in which writs of mandate were demanded to require the defendants to process bond issues both of which had obtained a majority vote but less than a two-thirds vote. In both cases the state Supreme Court said that Section 40 of Article XIII of the State Constitution which required a two-thirds vote was unconstitutional as in violation of the "one man, one vote" requirement but refused to grant the writs demanded since it declined to make its opinions retroactive. Both of the defendants, therefore, won. The state Supreme Court has no original jurisdiction to give a declaratory judgment so the statement as to the validity of Section 40 of Article XIII was dictum in both cases. Nevertheless both defendants filed petitions for certiorari and both petitions were granted on the authority of *Gordon v. Lance* (1970) 403 U.S. 1;[40] *Mihaly v. Westbrook* (1971) 403 U.S. 915;[41] *Mize v. Alhambra City School District* (1971) 403 U.S. 927.[42]

If, for any reason the judgments cannot be reversed we ask this Court to do the same and to disapprove the

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[40]91 S.Ct. 1889, 29 L.Ed.2d 273.
[41]29 L.Ed.2d 692.
[42]29 L.Ed.2d 706.

clearly erroneous statements of the California Supreme Court.

(j) The opinions of the State Supreme Court, appendices "A" and "B" constitute the respective judgments. Both were entered on Septmber 3, 1971.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that this petition for writs of certiorari should be granted.

Dated October 18, 1971, at Los Angeles, California.

JOHN D. MAHARG,
County Counsel

and

EDWARD H. GAYLORD,
Division Chief
Counsel for Petitioners

APPENDIX "A"

5 Cal.3d 656, 97 Cal.Rptr.
488 P.2d

COPY

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

JAMES PERRINE, Petitioner, v. THE MUNICIPAL COURT FOR THE EAST LOS ANGELES JUDICIAL DISTRICT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	L.A. 29852 (Municipal Court, East Los Angeles Judicial District, Nos. M 119690 and M 120152)

[Filed Sep. 3, 1971, G. E. Bishel, Clerk, S. F. Deputy].

Petitioner seeks a writ of prohibition to restrain respondent court from taking further proceedings in criminal actions charging him with violating Los Angeles County Ordinance 5860, section 321[1] which prohibits the operation of a bookstore without first securing a license from the Los Angeles County Public Wel-

[1]"Sec. 321. (9897 11-28-69) *Bookstore.* Every person conducting a bookstore the principal business of which is the sale of books or the sale of books and periodicals shall first procure a license and pay a license fee of twenty-five dollars. This section does not apply to the sale of books or periodicals as an incident to some other business or occupation."

fare Commission. Since the ordinance sets no adequate standards for issuing licenses we conclude that it constitutes an invalid prior restraint on the exercise of freedoms guaranteed by the First Amendment and is therefore unconstitutional on its face. We also hold that it is constitutionally impermissible to deny an applicant a license to operate a bookstore solely upon the ground that he has suffered a prior criminal conviction.

The facts are not in dispute. For several years petitioner has been engaged in the business of selling books and magazines in Los Angeles County at various leased locations. On November 28, 1969, Los Angeles County adopted an ordinance requiring that every person operating a bookstore procure a license and pay a license fee of $25. (Los Angeles County Ordinance 5860, §§ 321, 322.)[2] It provides that operating a bookstore without a license is a misdemeanor and that each day's unlicensed operation constitutes a separate offense. (Los Angeles County Ordinance 5860, §§7, 13.)[3]

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[2]See footnote 1, supra, for section 321. "Sec. 322. (9897 11-28-69) *Grant or Denial of Bookstore License.* A license for a bookstore shall be granted or denied as provided in Section 329.4."

[3]"Sec. 7. *Misdemeanor to engage in licensed activity without a license.* Every person who engages in, conducts, manages, or carries on any business or other activity for which a license is required by this ordinance without first having procured a license so to do and having paid the fee if any for such license as in this ordinance provided, is guilty of a misdemeanor.

"Sec. 13. *Violation Punishment.* Any person violating any of the provisions of this ordinance or of any regulation imposed pursuant thereto is guilty of a misdemeanor punishable by a fine of not exceeding five hundred dollars or by imprisonment in the County Jail for a period not exceeding six months, or by both such fine and imprisonment. Each such person is guilty of a separate offense for every day during any portion of which any violation of any of the provisions of this ordinance or of any such regulation is committed, continued or permitted by such person, and shall be punished therefor as provided by this ordinance."

Section 329.2 and 329.4[4] set forth provisions for granting or denying a license. Petitioner applied for a bookstore license in December 1969. After two continuances the county public welfare commission held a hearing on April 21, 1970, at which time petitioner admitted a 1968 conviction for violation of Penal Code section 311.2 (selling, distributing, or exhibiting obscene matter). At the hearing the Los Angeles County Sheriff

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[4]"Sec. 329.2 (9557 5-31-68) *Exhibition - Hearing.* Except as otherwise provided in Section 63 a license required by Section 329 shall not be granted until the Public Welfare Commission or its hearing officers holds a public hearing, notice of the time and place of which shall be given to the applicant as required by Section 101."

Section 329.4, made applicable to bookstores by section 322, provides: "(9947 2-20-70) *Granting License.* The Commission may grant a license for an exhibition if, either after a public hearing or pursuant to Section 63 it finds:

"(a) The operation of the exhibition will be carried on at a location and, if in a building or structure, in a building or structure, which location, building and structure comply with and meet all of the health, zoning, fire and safety requirements and standards of the laws of the State of California and ordinances of the County of Los Angeles applicable to such business operation.

"(b) The applicant, his employee, agent or any person connected or associated with the applicant as partner, director, officer, stockholder, associate or manager;

"(1) Has not been convicted within the last five years in any court of competent jurisdiction of: (i) Any crime requiring registration under Section 290 of the Penal Code, or (ii) Any violation of Chapter 7.5 (beginning with Section 311) of Title 9, Part 1 of the Penal Code, or (iii) Any violation of Chapter 7.6 (beginning with Section 313) of Title 9, Part 1 of the Penal Code, or (iv) Any violation of Paragraphs (a), (b), or (d) of Section 647 of the Penal Code, or (v) Any violation of Section 315, or 316, or 318 of the Penal Code, or (vi) Any offense involving the use of force or violence upon the person of another, or (vii) Any offense involving the maintenance of a nuisance in connection with the same or similar business operation.

"(2) Has not committed within the last five years any offense described in sub-paragraphs (i), (ii), (iii), (iv), (v), or (vi) of Paragraph (1) of this subsection.

"(3) Has not allowed or permitted acts of sexual misconduct to be committed within prior business operations.

"(c) The applicant, his employee, agent or any person connected or associated with the applicant as partner, director, officer, stockholder, associate, or manager, has not knowingly made any false, misleading or fraudulent statement of material fact in the application for a license or in any report or record required to be filed with the Tax Collector or Commission.

"(d) The applicant has not had a similar type of license previously revoked for good cause within one year prior to the application, or if he has, he also has shown material changes in circumstances since such revocation."

urged that section 329.4, subdivision (b)(1)(ii) required that petitioner's application be denied because of his 1968 conviction. The matter was taken under submission, and on May 20, 1970, the commission denied the application without opinion.

Pursuant to Los Angeles County Ordinance 5860, article 9.5, petitioner appealed the commission's decision to the license appeals board, which denied the appeal without opinion on September 21, 1970. While the appeal was pending petitioner was twice arrested and charged with operating a bookstore without a license. Petitioner filed demurrers to the complaints on the ground that the ordinance is unconstitutional. The demurrers were overruled and a trial date set. Petitioner seeks by this petition for writ of prohibition to restrain respondent court from proceeding with the trials.[5]

Petitioner challenges the validity of the county ordinance on several grounds. His principal contentions are (1) that the absence of objective and definite standards for the issuance of a license renders the ordinance unconstitutional on its face; (2) that the ordinance improperly conditions the issuance of bookstore licenses upon qualifications that have no reasonable relationship to the occupation of selling books; and (3) that in any event it is constitutionally impermissible to prohibit a person from selling books solely

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[5]Petitioner has standing to challenge the constitutionality of the ordinance even though he has not been convicted of violating it. (Burton v. Municipal Court (1968 68 Cal.2d 684, 688.)

on the basis of a past criminal conviction or convictions. Since there is merit in these contentions we find it unnecessary to consider petitioner's other contentions.

Although the activity of selling or distributing books is not exempt from reasonable regulation, it is entitled to First Amendment protection (Smith v. California (1959) 361 U.S., 147, 150; see Near v. Minnesota (1930) 283 U.S. 697, 720; Burton v. Municipal Court (1968) 68 Cal. 2d 684, 689). Statutes which authorize public officials to license conduct protected by the First Amendment must set forth definite, objective guidelines for the issuance of such licenses. (Staub v. City of Baxley (1958) 355 U.S. 313, 321; Schneider v. State (1938) 308 U.S. 147, 162; Hague v. C.I.O. (1939) 307 U.S. 496, 516; Interstate Circuit, Inc. v. City of Dallas (1968) 390 U.S. 676, 682; Thornhill v. Alabama (1940) 310 U.S. 88, 97-98; Burton v. Municipal Court, supra, 68 Cal. 2d 684, 689.) Accordingly statutes which have empowered public officials to exercise their discretionary authority with respect to First Amendment activities in light of the applicant's "good character" (Schneider v. State, supra, 308 U.S. 147, 158; In re Porterfield (1946) 28 Cal. 2d 91, 111), the anticipated effect of his conduct upon the "public welfare or morals" (Staub v. City of Baxley, supra, 355 U.S. 313, 315; Shuttleworth v. Birmingham (1969) 394 U.S. 147, 151) and the "sacrilegious" or "cruel, obscene, indecent or immoral" nature of the subject matter to be distributed (Joseph Burstyn, Inc. v. Wilson (1952)

343 U.S. 495, 506; Holmby Productions, Inc. v. Vaughn (1955) 350 U.S. 870) have been held to be unconstitutionally vague and overbroad. The danger of censorship and arbitrary suppression inherent in the employment of such imprecise standards is so great that the voiding of these regulations is required even in the absence of proof of actual discrimination (Burton v. Municipal Court, supra, 68 Cal. 2d 684, 696; Interstate Circuit, Inc. v. Dallas, supra, 390 U.S. 676, 689-690). Since statutes which accord officials excessive discretion are unconstitutional on their face, a fortiori those which vest unlimited discretionary power to issue or deny permits to engage in First Amendment activities are unconstitutional. (Kunz v. New York (1948) 334 U.S. 558; Lovell v. Griffin (1938) 303 U.S. 444.)

The Los Angeles County bookstore licensing ordinance fails to provide the necessary safeguards as it sets *no* standards governing the issuance of a license. By its terms section 329.4 provides that the commission *may* grant a license if it finds that none of the disqualifying factors exist.[6] Thus there is "no guarantee that a permit will issue even if the application meets all of the . . . conditions of the section" (Dillion v. Municipal Court, 4 Cal. 3d 860, 870). The county insists that the ordinance does not confer such discretion upon the commission and that it must grant a license if the conditions are satisfied. Not only is such a

[6]Section 329.4 provides: "*Granting License.* The Commission may grant a license for an exhibition if, . . ."

construction inconsistent with past judicial interpretation (Dillion v. Municipal Court, supra, at pp. 870-871) and with accepted definitions,[7] it flies in the face of section 29 of the ordinance which clearly defines "may" as permissive and "shall" as mandatory.[8] The only reasonable conclusion is that the ordinance as written confers on the public welfare commission virtually unlimited authority to deny any application for a bookstore license. No other reading of the provisions of the ordinance is intellectually supportable.

The county contends that the language of section 329.4 that "the Commission may grant [a license] if . . . it finds" that none of the disquailfying factors exist clearly implies that it must deny a license unless it can make such a finding. Accordingly, it concludes that as to persons who are disqualified, the commission has no discretion and that therefore the ordinance is valid insofar as it prohibits granting licenses to such persons. As so interpreted, however, the ordinance would nevertheless leave vast discretion to the commission. The ordinance does not define what showing the commission could demand that the applicant satisfied the host of qualifications set forth in section 329.4. Its application is therefore fraught with dangers of invidious discrimination. Moreover, many of the subdivisions of section 329.4 are themselves fatally vague. Subdivisions (b) and (c) do not define who

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[7]Webster's New Twentieth Century Dictionary (2d ed.): "may, v.: might, . . . contingency, as in clause of purpose, result, concession, or condition; . . ."

[8]"Sec. 29. 'Shall' and 'May.' 'Shall' is mandatory and 'May' is permissive."

may be deemed an "associate" of the applicant whose conduct may disqualify the applicant. Subdivision (b)(3) does not define what constitutes "acts of sexual misconduct," and is therefore unconstitutionally vague. (See, e.g., Interstate Circuit, Inc. v. Dallas, supra, 390 U.S. 676, 688-690 ["sexual promiscuity"]; Holmby Productions, Inc. v. Vaughn (1955) 350 U.S. 870 ["indecent, immoral"]; Commercial Pictures Corp. v. Regents (1954) 346 U.S. 587 ["cruel, obscene"]) Finally the commission is not limited to denying a license on the basis of a conviction of any of the enumerated crimes, but must determine whether the applicant or any of his associates have committed any of those crimes, a determination that may be fraught with uncertainty, particularly in the area of crimes involving obscenity.

Moreover, we believe that even if the ordinance limited its disqualification to applicants who had either been convicted of one or more of the enumerated crimes or whose adequately defined coparticipants in the proposed business had been so convicted it would nevertheless be invalid.

Even in the absence of First Amendment considerations, an ordinance regulating the right to engage in a lawful occupation or business must bear a rational relationship to a valid governmental purpose. (Skaggs v. Oakland (1936) 6 Cal. 2d 222, 224-225; Laurel Hill Cemetery v. City of San Francisco (1907) 152 Cal. 464, 470, affd. 216 U.S. 358.) Accordingly, standards for excluding persons from engaging in such commer-

cial activities must bear some reasonable relation to their qualifications to engage in those activities. (Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 234-235.) In the present case we perceive no reasonable relation between the qualifications of an applicant to operate a bookstore and any past conviction of any of the vast number of crimes listed in section 329.4 he or any of his coparticipants may have suffered.

Participants in the business of selling books require no special expertise. They are not like doctors or lawyers or school teachers whose past criminal convictions are often directly related to their occupational qualifications and may therefore be reasonably invoked to bar them from practicing their professions. (See, Werner v. State Bar (1944) 24 Cal. 2d 611; Bruns v. State Bar (1941) 18 Cal. 2d 667; Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 471-472.) The ordinance in this case appears to be primarily concerned with persons who have been convicted of sex crimes or crimes of violence against the person, including the most trivial assaults and batteries. No showing has been made that such persons are in any way disqualified to participate in the operation of a bookstore or likely to abuse the right to do so to promote any criminal propensities that they may still possess. Sex crimes are not ordinarily committed on bookstores, and crimes of violence are much more likely to be committed against bookstorekeepers than by them in their shops. The ordinance's broad exclusion for past crim-

inal convictions goes far beyond any constitutionally permitted restriction on the right to engage in a lawful occupation or business.[9]

It is contended, however, that at least as to crimes involving obscenity, there is a reasonable relationship between conviction of such crimes and the operation of a bookstore.[10] Accordingly, it is urged that the commission lawfully denied petitioner's application for a license on the basis of his conviction for violating Penal Code section 311.2. This contention cannot stand in the face of the First Amendment. Since in a host of other contexts the ordinance directly and unconstitutionally restricts the right to engage in activities protected by the First Amendment, we cannot sustain its application to petitioner even though a narrowly drawn ordinance might constitutionally permit denying his application. (Burton v. Municipal Court, supra, 68 Cal. 2d 684, 696; Thornhill v. Alabama, supra, 310 U.S. 88, 97-98.) Moreover, since a denial of a license would prohibit petitioner from engaging in an activity protected by the First Amendment, it could only be justified, even under a narrowly drawn ordinance, if permitting a person who had been convicted of a crime involving obscenity to operate a bookstore constituted

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[9]In reaching this decision we intend to cast no doubt on the right of a legislative body to enact under the police power reasonable regulations, including the licensing of bookstores, which are specifically drawn to meet proper purposes such as compliance with health, fire, and safety laws.

[10]The county is, however, somewhat inconsistent in its claims. It assures us that the ordinance is not designed to and "in no way regulates the contents of the books themselves." Yet it also makes the highly questionable and factually unsupported claim that a "person who has been convicted of selling or distributing obscene matter is less likely to comply with § 311.2 of the Penal Code than a person who has not violated that section."

a clear and present danger of a serious, substantive evil. (Wirta v. Alameda-Contra Costa Transit District (1968) 68 Cal. 2d 51, 60; Thomas v. Collins (1943) 323 U.S. 516, 530; Board of Education v. Barnette (1942) 319 U.S. 624, 639.) No such clear and present danger appears. We cannot assume that because petitioner was once convicted of violating Penal Code section 311.2, he will violate it again, or that if he does so, criminal sanctions will not afford an adequate remedy. (See, Near v. Minnesota, supra, 283 U.S. 697, 715.) Appropriate to the facts of the present case are the comments of the United States Supreme Court in Bantam Books, Inc. v. Sullivan (1962) 372 U.S. 58, 66, 69-70, made with reference to a Rhode Island commission established, not to prohibit the distribution or sale of literature, but merely to notify publishers of material it deemed to be objectionable and to recommend prosecution: "[T]he Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line . . . The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity. . . . In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process . . . The Commission's practice is in striking contrast, in that it provides no safeguards against the suppression of the non-obscene, and therefore constitutionally protected matter. It is a form of

regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."

To interpret the ordinance in this case to permit denial of a license because of a past conviction of violating Penal Code section 311.2 would do more than create a hazard to protected freedoms; it would suppress them altogether. The penalty for violating section 311.2 does not include a forfeiture of First Amendment rights, and the risk that criminal sanctions will be insufficient to deter future violations of that section cannot justify the county's attempted forfeiture of those rights on the theory that past violators are unfit to operate bookstores.

Since the licensing ordinance is unconstitutional on its face, respondent court lacks jurisdiction of the criminal proceedings against petitioner.

Let a peremptory writ of prohibition issue as prayed.

WRIGHT, C. J.

WE CONCUR:

PETERS, J.
TOBRINER, J.
MOSK, J.
SULLIVAN, J.

DISSENTING OPINION BY BURKE, J.

I dissent. I agree with the majority's determination that the ordinance in question lacked sufficient standards to guide the commission's discretion in granting or denying a license in those cases wherein none of the enumerated disqualifying factors (e.g., prior conviction of obscenity offense) exists. In the instant case, however, Perrine had been convicted of a prior obscenity offense and accordingly the commission had no discretion to exercise but was required by the ordinance to deny him a license. Thus, as applied to Perrine, the ordinance was not void for lack of standards.[1]

The majority also hold a municipality is without authority to deny a bookstore license to one previously convicted of certain crimes, including the distribution of obscene materials. It seems evident to me, however, that such authority derives from the general police power to preserve, promote and protect the public health, safety, morals and general welfare.

In his own words, James Perrine "learned the business of selling adult material" while working in and operating a San Francisco bookstore and motion pic-

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[1]Our opinion in Burton v. Municipal Court, 68 Cal.2d 684, would not preclude us from upholding at least that portion of the ordinance which applied to persons, such as Perrine, who had previously been convicted of an obscenity offense. In *Burton*, we noted that an ordinance failing to meet the required criteria is unenforceable "even though the defendant's conduct may have run afoul of a statute *which could have been adopted* in satisfaction of those criteria." (Italics added; p. 696.) In the instant case, the ordinance *did* contain a properly objective standard for denying a license (prior obscenity conviction); moreover, the ordinance contained a broad severability clause. Therefore, since the evidence is uncontradicted that the commission in fact denied Perrine a license for the sole reason of his prior offense, the ordinance was valid as applied to him.

ture arcade; subsequently, he acquired his own bookstore, "The Citadel" in Los Angeles. On July 11, 1969, Perrine was convicted for distributing obscene material (Pen. Code, §311.2). Following the adoption of the ordinance in question, he applied for a license to operate The Citadel and another bookstore, The Arena, also in Los Angeles. He also sought a license for a picture arcade at The Citadel.

The majority confidently state that "We cannot assume that because petitioner was once convicted of violating Penal Code section 311.2, he will violate it again . . ." To the contrary, I think it reasonaly likely that he will. An advertisement for The Citadel bookstore, in the August 1970 Los Angeles Telephone Director (Yellow Pages), page 352, openly announces: "Erotic Action — Underground Literature — Adults Only . . . Paperbacks, Magazines, Stag Films . . ."[2] But even without considering the foregoing evidence, the commission properly denied Perrine a license to operate a bookstore.

The rule is clear that a municipality may impose reasonable restrictions upon the conduct of an economic enterprise, including the requirement that a license to operate be obtained. "That First Amendments rights are being utilized on the premises does not exempt a commercial entrepreneur from compliance with reasonable regulations under the police power. The requirement that a license be obtained as

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[2]We may take judicial notice of petitioner's advertisement under Evidence Code section 452, subd. (h).

a condition of engaging in the . . . business is a reasonable means of assuring compliance with police power regulations." (Burton v. Municipal Court, *supra,* 68 Cal. 2d 684, 690.) In *Burton,* this court struck down as overly broad an ordinance which permitted the licensing agency to refuse a license to a motion picture exhibitor "who has in the past shown motion pictures *admittedly not obscene* because he has failed to demonstrate to its satisfaction that the pictures he has exhibited are in 'good taste' because a vocal segment of the community objects to them and because, in the board's unfettered judgment, the operation of the theater, showing films with 'immoral characterists' is not 'compatible' with a 'better and healthier community.'" (Italics added; p. 695.)

Had the ordinance in *Burton* had more precise standards and had authorized the agency to refuse to grant or renew a license for an exhibitor previously convicted for showing *obscene* films, the result reached in that case might well have been different. *Burton* expressly recognized the validity of regulations "specifically drawn to meet a proper public purpose, such as compelling the theater building to satisfy health, fire and safety laws, *or requiring the operation of the business to comply with the law in other specific respects . . .*" (Italics added; p. 696.) Thus, *Burton* does support the position that a failure to comply with state law could constitute a proper ground for denial of a commercial license, whether or not First Amendment rights are thereby affected. Indeed, it

has long been held that a municipality may properly deny a business or professional license to one convicted of a crime bearing a reasonable relation to the nature of the operations sought to be licensed, on the theory that such prior offense is evidence of the applicant's unfitness to engage therein. (Hawker v. New York, 170 U.S. 189; Hollingsworth v. Board of Medical Examiners, 188 Cal. App. 2d 172; see Morrison v. State Board of Education, 1 Cal. 3d 214, 220-230.)

Promotion of public morality is a legitimate aspect of the police power. (See Near v. Minnesota, 283 U.S. 697, 707; Eye Dog Foundation v. State Board of Guide Dogs for the Blind, 67 Cal. 2d 536, 548; 11 Cal. Jur. 2d, Constitutional Law, §§ 159, 168, and cases cited.) The owner-operator of a bookstore is in daily contact with the public, including the impressionable young, and we have recently acknowledged that public distribution of obscene materials poses sufficient dangers to the public morality to support governmental regulation thereof. (People v. Luros, 4 Cal. 3d 84, 91-93.) A municipality should not be required to rely exclusively upon the operation and enforcement of state obscenity laws (which have, for a variety of reasons, proven somewhat ineffective in this state) in

controlling the distribution of obscene material.[3] A prior conviction of an obscenity offense furnishes a reasonable basis for concluding that an applicant such as Perrine will repeat the offense.[4]

I would deny the writ of prohibition.

BURKE, J.

I CONCUR:

McComb, J.

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[3]Near v. Minnesota, *supra*, 283 U.S. 697, cited by the majority, does not compel a contrary conclusion. In *Near*, the offending ordinance permitted public officials to take legal proceedings against the owner or publisher of a newspaper upon a charge of publishing a scandalous and defamatory matter, and to obtain an order suppressing further publication of the newspaper. The ordinance was not restricted to persons *convicted* of obscenity offenses, but extended to persons *charged* with promoting scandal and libel. (See p. 713.) Moreover, the ordinance in *Near* operated as a prior restraint upon the publication of a newspaper; its effect upon the dissemination of ideas was direct and substantial. On the other hand, the instant ordinance does not restrain publication or distribution of any particular book or magazine; it simply denies those persons convicted of certain criminal offenses a license to operate a bookstore.

[4]The majority's statement to the contrary does not, I trust, indicate that they would also invalidate a properly drawn license *revocation* ordinance which provided that a bookstore or other license could be revoked in the event that subsequent obscenity offenses occurred. Such ordinances may ultimately become instrumental in inhibiting the distribution of obscene materials, and yet their rationale (like that underlying the license ordinance herein) must be that conviction of a prior obscenity offense renders the distributor unfit to operate a bookstore, i.e., his conviction affords a reasonable basis for concluding that he will commit further offenses.

APPENDIX "B"

5 Cal.3d 669, 97 Cal.Rptr.
488 P.2d

COPY

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

JOANNE L. BAKER, et al., Petitioners,	)	
v.	)	L.A. 29860
THE MUNICIPAL COURT FOR THE EAST LOS ANGELES JUDICIAL DISTRICT OF LOS ANGELES COUNTY, et al., Respondents;	)	
THE PEOPLE, Real Party in Interest.	)	

[Filed Sep. 3, 1971, G. E. Bishel, Clerk, S. F. Deputy].

Petitioners, the operators of several Los Angeles County bookstores, are charged with violating Los Angeles County Ordinance 5860, section 321, which prohibits the operation of a bookstore without securing a license from the Los Angeles County Welfare Commission. Petitioners seek writs of prohibition to restrain the respondent courts from taking further proceedings in criminal actions charging them with violations of the ordinance. Since the ordinance is un-

constitutional on its face (Perrine v. Municipal Court, ante p. *656*) the respondent courts lack jurisdiction of the criminal proceedings against petitioners.

Let peremptory writs of prohibition issue as prayed for.

WRIGHT, C. J.

WE CONCUR:

PETERS, J.
TOBRINER, J.
MOSK, J.
SULLIVAN, J.

DISSENTING OPINION BY BURKE, J.

I dissent. For the reasons stated in my dissenting opinion in Perrine v. Municipal Court. *ante* p. *656,* it is my view that the ordinance in question is valid as applied to applicant licensees who have suffered prior convictions for obscenity offenses.

BURKE, J.

I CONCUR:

McComb, J.

APPENDIX "C"

Provisions of California Statutes referred to in Section 329.4 of the County License Ordinance (as the said ordinance read prior to March 26, 1971) in the order cited.

First paragraph of Section 290 of the Penal Code of the State of California as amended by Calif. Stats. 1970 ch. 1301 page 2405 at page 2406:

> "290. Any person who, since the first day of July, 1944, has been or is hereafter convicted in the State of California of the offense of assault with intent to commit rape or the infamous crime against nature, under Section 220, or of any offense defined in Sections 266, 267, 268, 285, 286, 288, 288a, subdivision 1 of Section 647a, subdivision 2 or 3 of Section 261, subdivision (a) or (d) of Section 647, or subdivision 1 or 2 of Section 314 or of any offense involving lewd and lascivious conduct under Section 272; or any person who since such date has been or is hereafter convicted of the attempt to commit any of the above-mention offenses; or any person who since such date or at any time hereafter is discharged or paroled from a penal institution where he was confined because of the commission or attempt to commit one of the above-mentioned offenses; or any person who since such date or at any time hereafter is determined to be a mentally disordered sex offender under the provisions of Article 1 (commencing with Section 6300) of Chapter 2 of Part

2 of Division 6 of the Welfare and Institutions Code; or any person who has been since such date or is hereafter convicted in any other state of any offense which, if committed or attempted in this state, would have been punishable as one or more of the above-mentioned offenses shall within 30 days after the effective date of this section or within 30 days of his coming into any county or city, or city and county in which he resides or is temporarily domiciled for such length of time register with the chief of police of the city in which he resides or the sheriff of the county if he resides in an unincorporated area."

Section 220 of the Penal Code as amended by Calif. Stats. 1937 chap. 553, page 1581:

"220. Every person who assaults another with intent to commit rape, the infamous crime against nature, mayhem, robbery, or grand larceny, is punishable by imprisonment in the State prison not less than one year nor more than twenty years."

Section 266 of the Penal Code as amended by Calif. Stats. Code Amendments, 1873-74, chap. 614 p. 429:

"266. Every person who inveigles or entices any unmarried female, of previous chaste character, under the age of eighteen years, into any house of ill-fame, or of assignation, or elsewhere, for the purpose of prostitution, or to have illicit carnal connection with any man; and every person who aids or assists in such inveiglement or enticement; and every person who, by any false pre-

tenses, false representation, or other fraudulent means, procures any female or have illicit carnal connection with any man, is punishable by imprisonment in the state prison not exceeding five years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment."

Section 267 of the Penal Code as originally enacted in 1872:

"267. Every person who takes away any female under the age of eighteen years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is punishable by imprisonment in the state prison not exceeding five years, and a fine not exceeding one thousand dollars."

Section 268 as added to the Penal Code by Calif. Stats. 1889, chap. 15, page 12:

"268. Every person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment in the state prison for not more than five years, or by a fine of not more than five thousand dollars, or by both such fine and imprisonment."

Section 285 of the Penal Code as amended by Calif. Stats. 1921, chap. 101, page 96:

> "285. Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, are punishable by imprisonment in the state prison not less than one year nor more than fifty years."

Section 286 of the Penal Code as amended by Calif. Stats. 1st Extra Session, chap. 23, p. 380:

> "286. Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, in punishable by imprisonment in the state prison not less than one year."

Section 288 of the Penal Code as amended by Calif. Stats. 1937, chap. 545, page 1562:

> "288. Any person who shall wilfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in part one of this code upon or with the body, or any part or member there, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the State prison for a term of from one year to life."

Section 288a of the Penal Code as amended by Calif. Stats. 1955, chap. 274, p. 729:

> "288a. Any persons participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the state prison for not exceeding 15 years, or by imprisonment in the county jail not to exceed one year; provided, however, whenever any person is found guilty of the offense specified herein, and it is charged and admitted or found to be true that he is more than 10 years older than his coparticipant in such an act, which coparticipant is under the age of 14, or that he has compelled the other's participation in such an act by force, violence, duress, menace, or threat of great bodily harm, he shall be punished by imprisonment in the state prison for not less than three years. The order of commitment shall expressly state whether a person convicted hereunder is more than 10 years older than his coparticipant and whether such coparticipant is under the age of 14. The order shall also state whether a person convicted hereunder has compelled coparticipation in his act by force, violence, duress, menace, or threat of great bodily harm."

The reference in Section 290 of the Penal Code to "* * * subdivision (1) of Section 647a * * *" apparently referred to the section as amended by Calif. Stats. 1957, chap. 1735, page 3119 which contained two subdivisions. Subdivision (2) was eliminated by Calif. Stats. 1967 ch. 154, p. 1241, so that the reference now means Section 647a, which reads:

"647a. Every person who annoys or molests any child under the age of 18 is a vagrant and is punishable upon first conviction by a fine not exceeding five hundred dollars ($500) or by imprisonment in the county jail for not exceeding six months or by both such fine and imprisonment and is punishable upon the second and each subsequent conviction or upon the first conviction after a previous conviction under Section 288 of this code by imprisonment in the state prison for not less than one year."

The portion of Section 261 of the Penal Code referred to in Section 290, which Section 261 was amended by Calif. Stats. 1970, ch. 1301 page 2405 reads:

"261. Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances:

* * *

"2. Where she resists, but her resistance is overcome by force or violence;

"3. Where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, or by any intoxicating narcotic, or anesthetic, substance, administered by or with the privity of the accused;
* * *."

That portion of Secton 647 of the Penal Code, as amended by Calif. Stats. 1970 ch. 26 page 43, referred to by Section 290 reads:

"647. A person who commits any of the following acts is guilty of disorderly conduct:

"(a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or place open to the public or exposed to public view.

"(b) Who solicits or engages in acts of prostitution. As used in this subdivision, 'prostitution' includes any lewd act between persons for money or other consideration.

* * *

"(d) Who loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act. * * *"

Section 314 of the Penal Code as amended by Calif. Stats. 1961 ch. 2147, p. 4429:

"314. Every person who wilfully and lewdly, either:

"1. Expose his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or

"2. Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a misdemeanor.

"Upon the second and each subsequent conviction under subdivision 1 of this section, or upon a first conviction under subdivision 1 of this section after a previous conviction under Section 288 of this code, every person so convicted is guilty of a felony, and is punishable by imprisonment in state prison for not less than one year."

Section 272 of the Penal Code as amended by Calif. Stats. 1961 ch. 1616, page 3503:

"272. Every person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 21 years to come within the provisions of Sections 600, 601, or 602 of the Welfare and Institutions Code or which act or omission contributes thereto, or any person who by any act or omission, or by threats, commands, or persuasion, induces or endeavors to induce any person under the age of 21 years or any ward or dependent child of the juvenile court to fail or refuse to conform to a lawful order of the juvenile court, or to do or to perform any act or to follow any course of conduct or to so live as would cause or manifestly tend to cause any such person to become or to remain a person within the provisions of Sections 600, 601, or 602 of the Welfare and Institutions Code, is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment in a county jail, or may be re-

leased on probation for a period not exceeding five years. The district attorney shall prosecute all violations charged under this section."

Article 1 (commencing with Section 6300) of Chapter 2 of Part 2, of Division 6, added to the Welfare and Institutions Code by Calif. Stats. 1967, chap. 1667 page 4053 at page 4116:

Chapter 2. Commitment Classification
Article 1. Mentally Disordered Sex Offenders

6300. As used in this article, "mentally disordered sex offender" means any person who by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others. Wherever the term "sexual psychopath" is used in any code such term shall be construed to refer to and mean a "mentally disordered sex offender."

6301. This article shall not apply to any person sentenced to death nor to any person ineligible for probation under the Penal Code. This article shall not apply to any person convicted of an offense the punishment for which may be death until after a sentence other than death has been imposed, at which time this article shall apply to such person and he may be certified to the superior court as provided in Section 6302.

6302. (a) When a person is convicted of any criminal offense, whether or not a sex offense, the trial judge, on his own motion, or on motion of the prosecuting attorney, or on application by affidavit by or on

behalf of the defendant, if it appears to the satisfaction of the court that there is probable cause for believing such a person is a mentally disordered sex offender within the meaning of this chapter, may adjourn the proceeding or suspend the sentence, as the case may be, and may certify the person for hearing and examination by the superior court of the county to determine whether the person is a mentally disordered sex offender within the meaning of this article. Conviction upon a charge of violation of Section 290 of the Penal Code by failure to register as required thereby is conviction of a criminal offense within the meaning of this subdivision.

(b) When a person is convicted of a sex offense involving a child under 14 years of age and it is a misdemeanor, and the person has been previously convicted of a sex offense in this or any other state, the court shall adjourn the proceeding or suspend the sentence, as the case may be and shall certify the person for hearing and examination by the superior court of the county to determine whether the person is a mentally disordered sex offender within the meaning of this article.

(c) When a person is convicted of a sex offense involving a child under 14 years of age and it is a felony, the court shall adjourn the proceeding or suspend the sentence, as the case may be, and shall certify the person for hearing and examination by the su-

perior court of the county to determine whether the person is a mentally disordered sex offender within the meaning of this article.

(d) When a person over the age of 16 years has been found by the juvenile court to be a person described by Section 601 or 602 of this code and adjudged to be a ward of the court, the juvenile court judge on his own motion, or on motion of the probation officer, or on application by affidavit by or on behalf of the ward, if it appears to the satisfaction of the court that there is probable cause for believing such person is a mentally disordered sex offender within the meaning of this article, may adjourn the proceeding and may certify the person for hearing and examination by the superior court of the county to determine whether the person is a mentally disordered sex offender within the meaning of this article.

When an affidavit is filed under (a) or (d) it shall be substantially in the form specified for the affidavit in Section 6251 of this code. The title and body of the affidavit shall refer to such person as "an alleged mentally disordered sex offender" and shall state fully the facts upon which the allegation that the person is a mentally disordered sex offender is based. If the person is then before the court or is in custody, the court may order that the person be detained in a place of safety until the issue and service of an order for examination and detention as provided by this article.

When the court certifies the person for hearing and examination by the superior court of the county to determine whether the person is a mentally disordered sex offender, the court shall transmit to the superior courts its certification to that effect, accompanied by a statement of the court's reasons for finding that there is probable cause for believing such person is a mentally disordered sex offender within the meaning of this article in cases certified under (a) or (d), or a statement of the facts making such certification mandatory under (b) or (c).

The judge or justice presiding in such court, whenever it is deemed necessary or advisable, may issue and deliver to some peace officer for service, an order directing that the person be apprehended and taken before a judge of the superior court for a hearing and examination to determine whether the person is a mentally disordered sex offender. The officer shall thereupon apprehend and detain the person until a hearing and examination can be had. At the time of the apprehension a copy of the affidavit if one was filed, the certification, accompanied by the court's statement, and the warrant shall be personally delivered to the person and copies thereof shall also be delivered to the superior court to which the person was certified and to the district attorney of the county.

The order for examination and detention shall be substantially in the form provided by Section 6252 of this code.

6303. At the time of service of the petition and order for examination or detention, the officer making the service shall also deliver to each person served a copy of a notice which shall read substantially as follows:

The petition which accompanies this notice has been filed in the Superior Court in and for the County of ....., alleging that ..... is a .....

*.....is notified to present himself at the time and place designated in the attached order to submit to an examination into the state of his mental health. He is permitted to be accompanied by one or more of his relatives or friends to the place of examination. If he fails or refuses to appear for such examination, the court may issue an order for his forthwith detention for such examination.

*.....has been affirmatively alleged to be likely to injure himself or others if not immediately hospitalized or detained. The court has therefore issued the attached order for detention and for examination and hearing before the court. .....has the right to a hearing, to bring in witnesses and to have compulsory process therefor, and to be represented by an attorney.

If ..... or a relative, friend, counsel or representative desires to be heard by the court, he must within four days after service of this notice file a request for a hearing with the clerk of the Superior Court in and for the County of .....

*Strike out when not applicable.

6304. Whenever a person is certified to the superior court for hearing and examination under Section 6302 the certification may be made in substantially the following form:

(Title of court and cause)

Order Adjourning Proceedings and Certifying Alleged Mentally Disordered Sex Offender to the Superior Court

Upon the court's own motion, the motion of the prosecuting attorney, application by or on behalf of the defendant (strike the conditions not applicable), it appearing to the satisfaction of the court that the above-named defendant has been convicted of a criminal offense, to wit, violation of ..... of the State of California, and that there is probable cause for believing that said defendant is a mentally disordered sex offender within the meaning of Article 1 of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code of the State of California, as amended, in that—he is a person who by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others.

Now, therefore, the above proceeding is adjourned and it is hereby ordered that the above-named defendant is certified to the Superior Court of the State of California, in and for the County of ..... for hearing and examination by said court to determine

whether said defendant is a mentally disordered sex offender within the meaning of said Article 1 of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code of the State of California, as amended. The above-named defendant shall be taken before said court, as provided in Section 6305 of said code, on the ..... day of ....., 19....., at the hour of .....* A copy of this certification of said defendant to said superior court shall be delivered to said defendant.

Dated this ..... day of ....., 19.....

.....

Judge

*This sentence may be included if such date and hour have been set by the superior court upon the request of the certifying judge.

6305. The person certified or alleged to be a mentally disordered sex offender shall be taken before a judge of the superior court of the county. The judge shall then inform him that he is certified or alleged to be a mentally disordered sex offender, and inform him of his rights to make a reply and to produce witnesses in relation thereto. The judge shall by order fix such time and place for the hearing and examination in open court as will give reasonable opportunity for the filing of the probation officer's report as provided in Section 6306, and for the production and examination of witnesses. If, however, the person is too ill to appear in court, or if appearance in court would be detri-

mental to the mental or physical health of the person, the judge may hold the hearing at the bedside of the person. The order shall be entered at length in the minute book of the court or shall be signed by the judge and filed, and a certified copy thereof served on the person. The judge shall order that notice of the apprehension of the person and of the hearing of mentally disordered sex offender be served on the district attorney of the county and on such relatives of the person known to be residing in the county as the judge deems necessary or proper.

If the alleged mentally disordered sex offender has no attorney the judge may appoint an attorney to represent him, or if a request is made for an attorney by the alleged mentally disordered sex offender, the judge shall appoint an attorney to represent him, and, in a county where there is no public defender, fix the compensation to be paid by the county for such services if the court determines that the person is not financially able to employ counsel.

6306. The court shall refer the matter to the probation officer, along with a copy of the certification accompanied by the certifying court's statement, and the name and address of each psychiatrist appointed pursuant to Section 6306, to investigate and report to the court within a specified time, upon the circumstances surrounding the crime and the prior record and history of the person. The report shall include the criminal record, if any, of the person, obtained from the State Bureau of Criminal Identification and In-

vestigation. The probation officer shall furnish to the psychiatrists pertinent information concerning the circumstances surrounding the crime and the prior record and history of the person.

6307. The judge shall appoint not less than two nor more than three psychiatrists, each of whom shall be a holder of a valid and unrevoked physician's and surgeon's certificate who has directed his professional practice primarily to the diagnosis and treatment of mental and nervous disorders for a period of not less than five years, and at least one of whom shall be from the medical staff of a state hospital or county psychiatric hospital, to make a personal examination of the alleged mentally disordered sex offender, directed toward ascertaining whether the person is a mentally disordered sex offender.

6308. Each psychiatrist so appointed shall file with the court a separate written report of the result of his examination, together with his conclusions and recommendations and his opinion as to whether or not the person would benefit by care and treatment in a state hospital. At the hearing each psychiatrist shall hear the testimony of all witnesses, and shall testify as to the result of his examination, and to any other pertinent facts within his knowledge.

6309. Any psychiatrist so appointed by the court may be called by either party to the proceeding or by the court itself and when so called shall be subject to all legal objections as to competency and bias and as to qualifications as an expert. When called by the

court, or by either party to the proceeding, the court may examine the psychiarist, as deemed necessary, but either party shall have the same right to object to the questions asked by the court and the evidence adduced as though the psychiatrist were a witness for the adverse party. When the psychiatrist is called and examined by the court the parties may cross-examine him in the order directed by the court. When called by either party to the proceeding the adverse party may examine him the same as in the case of any other witness called by such party.

6310. The psychiatrists so appointed by the court shall be allowed such fees as in the discretion of the court seem just and reasonable, with regard to the services rendered by the psychiatrists, but in no event shall such fees exceed the sum of forty dollars ($40) per day in addition to actual traveling expenses. The fees allowed shall be paid by the county in which the hearing is held.

6311. The provisions of this article relating to psychiatrists appointed by the court shall not be deemed or contrued to prevent any party to a proceeding under this article from producing any other expert evidence as to the mental condition of the alleged mentally disordered sex offender.

6312. The judge shall also cause to be examined as a witness any other person whom he believes to have knowledge of the mental condition of the alleged mentally disordered sex offender, or of the financial con-

dition of the alleged mentally disordered sex offender and of any person liable for his support.

6313. The judge may, for any hearing, order the clerk of the court to issue subpoenas and compel the attendance of witnesses from any place within the boundaries of this state; but no person is obliged to attend as a witness in such a hearing out of the county where he resides or is served unless the judge, upon affidavit to the effect that affiant believes that the evidence of the witness is material and his attendance at the hearing necessary, indorses on the subpoena an order for the attendance of the witness.

All witnesses, other than psychiatrists appointed by the court, attending a hearing upon a subpoena issued under this section shall be entitled to the same fees and expenses as in criminal cases, to be paid upon the same conditions and in like manner.

6314. The alleged mentally disordered sex offender shall be present at the hearing, and if he has no attorney, the judge may appoint an attorney to represent him, or the judge may order the county public defender to represent him at the hearing, if he determines that the person is not financially able to employ counsel.

6315. If, upon the hearing, the person is found by the superior court not to be a mentally disordered sex offender, the superior court shall return the person to the court in which the case orginated for such dis-

position as that court may deem necessary and proper.

If the court finds the person is a mentally disordered sex offender, but would not benefit by care and treatment in a state hospital, the court may return the person to the court in which the case originated for such disposition as that court may deem necessary and proper.

6316. If, after examination and hearing, it appears there is sufficient cause to believe that the person is a mentally disordered sex offender within the meaning of this article, the judge may make and sign an order that the person be placed temporarily in a suitable psychiatric facility maintained by a county or in a state hospital of the Department of Mental Hygiene designated by the court for observation and diagnosis for a period not to exceed 90 days, with the further provision in said order that the superintendent of the hospital or person in charge of the county facility shall report to the court the diagnosis and recommendations concerning such person within the 90-day period. The court shall attach to the order for observation its findings and copies of the certification and statement from the other court, any affidavits filed, the written reports of the court-appointed psychiatrists, and the report of the probation officer, together with such social and other data that it has available bearing upon the case, and the same shall be delivered to the institution with such order.

The superintendent of the hospital or person in charge of the county facility shall within 90 days cause the person to be examined and forward to the committing court his opinion as to whether or not the person is a mentally disordered sex offender, whether or not he is a danger to the health and safety of others, and whether or not he will benefit by care and treatment in a state hospital, including therein a report, diagnosis and recommendation concerning the person's future care, supervision and treatment.

If the superintendent of the hospital or person in charge of the county facility reports to the court that the person is not a mentally disordered sex offender, the person shall be returned to the court for further disposition of his case. The court shall then cause the person to be returned to the court in which the criminal charge was tried to await further action with reference to such criminal charge.

If the superintendent of the hospital or person in charge of the county facility reports to the committing court that the person is a mentally disordered sex offender but will not benefit by care or treatment in a state hospital and is a danger to the health and safety of others, the court shall then cause the person to be returned to the court in which the criminal charge was tried to await further action with reference to such criminal charge. Such court shall resume the proceedings and shall impose sentence or make such other suitable disposition of the case as the court deems necessary. If however, such court is satisfied that the

person is a mentally disordered sex offender but would not benefit by care or treatment in a state hospital and is a danger to the health and safety of others, it may recertify the person to the superior court of the county. If the superior court, after hearing, finds that the person is a mentally disordered sex offender but would not benefit by care or treatment in a state hospital and is a danger to the health and safety of others, it may make an order committing the person for an indefinite period to the Department of Mental Hygiene for placement in a state institution or institutional unit for the care and treatment of mentally disordered sex offenders designated by the court and provided pursuant to Section 6326. At such hearing or hearings, the person shall be entitled to present witnesses in his own behalf, to be represented by counsel and to cross-examine any witnesses who testify against him. The person shall remain in such institution or institutional unit until he is no longer a danger to the health and safety of others. Thereupon, the proceedings set forth in Section 6325 shall be followed with respect to the certifying of an opinion to the committing court and the release of the person thereby.

If the superintendent of the hospital or person in charge of the county facility reports to the court that the person is a mentally disordered sex offender and that the person could benefit by treatment in a state hospital, the court in its discretion has the alternative to return the person to the criminal court for further disposition or may make an order committing the per-

son to the department for placement in a state hospital for an indeterminate period and a copy of such commitment shall be personally served upon said person within five days after the making of such order and such person may within 10 days demand a hearing in court and upon such demand said court shall order the return of said person to said court and fix a time and place for a hearing. Upon such hearing the court may accept the report of the superintendent of the hospital or person in charge of the county facility, if verified, in lieu of the examination by and testimony of court-appointed psychiatrists, or may consider the report as additional evidence. Upon such further hearing the court may make an order committing the person to the department for placement in a state hospital designated by the court for an indeterminate period, or may make other suitable disposition of the case.

No person shall be committed for an indeterminate period as a mentally disordered sex offender unless an observation placement has been made and reported, diagnosed and recommended upon as provided by this section.

6317. If the court orders the commitment of the person to the department for placement in a state hospital for an indeterminate period, the court may, in the order of commitment, require the superintendent of the state hospital to make periodic reports to the court concerning the person's progress towards recovery.

6318. If a person ordered under Section 6316 to be committed as a mentally disordered sex offender

to the department for placement in a state hospital for care and treatment following an observation placement in a county hospital, or any friend in his behalf, is dissatisfied with the order of the judge so committing him, he may, with 10 days after the making of such order, demand that the question of his being a mentally disordered sex offender be tried by a judge or by a jury in the superior court of the county in which he was committed. Thereupon the court shall set the case for hearing at a date, or shall cause a jury to be summoned and to be in attendance at a date stated, not less than five nor more than 10 days from the date of the demand for a court or jury trial. The court shall adjudge whether the person is a mentally disordered sex offender, or if it is a trial by jury the judge shall submit to the jury the question: Is the person a mentally disordered sex offender?

6319. Proceedings under this article under the order for commitment to the department for placement in a state hospital shall not be stayed, pending the proceedings for determining the question of whether the person is a mentally disordered sex offender by a judge or jury, except upon the order of a superior court judge, with provision made therein for such temporary care and custody of the person as the judge deems necessary. If the superior court judge, by the order granting the stay, commits the person to the custody of any person other than a peace officer, he may, by such order, require a bond for his appearance at the trial.

6320. At the trial the petition and its allegations that the person is a mentally disordered sex offender shall be presented by the district attorney of the county.

6321. The trial shall be had as provided by law for the trial of civil causes, and if tried before a jury the person shall be discharged unless a verdict that he a mentally disordered sex offender is found by at least three-fourth of the jury. If the judge adjudges or the verdict of the jury is that he is a mentally disordered sex offender the judge shall adjudge that fact and make an order similar to the original order for commitnment to the department for placement in a state hospital. The order committing the person to the department for placement in a state hospital shall be presented to the superintendent of the state hospital or other representative of the department to whom the person is committed.

6322. The sheriff of any county wherein an order is made by the court committing a person for an indeterminate period to a state hospital or returning such person to the court, or any other peace officer designated by the court, shall execute the writ of commitment or order of return, and receive as compensation therefor such fees as are now or may hereafter be provided by law for the transportation of prisoners to the state prison, which shall be payable in the same manner. No female person committed pursuant to this article shall be taken to or from any state or other hos-

pital without the attendance of some woman of good character and mature age or of a relative of the person.

The expense of transporting a person to a county facility or state hospital temporarily for an observation placement under this article and returning such person to the court is a charge upon the county in which the court is situated.

6323. Certified copies of the affidavit, certification from the trial court, order for examination or detention, order for hearing and examination, report of the probation officer and of the court-appointed psychiatrists, and the order of placement for observation or order of commitment for an indeterminate period, as the case may be, shall be delivered to the person transporting the mentally disordered sex offender to the county facility or state hospital, and shall be delivered by that person to the officer in charge of the facility or hospital.

6324. The provisions of Article 4 of Chapter 3 of Division 7 relative to the property and support of persons in state hospitals, the liability for such support, and the power and duties of the Department of Mental Hygiene and all officers and employees thereof in connection therewith shall apply to persons committed to state hospitals pursuant to this article the same as if such persons were expressly referred to in said Article 4.

6325. Whenever a person who is committed for an indeterminate period to the department for placement

in a state hospital as a mentally disordered sex offender (a) has been treated to such an extent that in the opinion of the superintendent the person will not benefit by further care and treatment in the hospital and is not a danger to the health and safety of others, or (b) has not recovered, and in the opinion of the superintendent the person is still a danger to the health and safety of others, the superintendent of the hospital shall file with the committing court a certification of his opinion under (a) or (b), as the case may be, including therein a report, diagnosis and recommendation concerning the person's future care, supervision or treatment. If the opinion so certified is under (a) the committing court shall forthwith order the return of the person to said committing court and shall thereafter cause the person to be returned to the court in which the criminal charge was tried to wait further action with reference to such criminal charge.

Such court shall resume the proceedings, upon the return of the person to the court and after considering all the evidence before it may place the person on probation for a perid or not less than five years if the criminal charge permits such probation and the person is otherwise eligible for probation. As a condition of such probation the person shall totally abstain from the use of alcoholic liquor or beverages. In any case, where the person is sentenced on a criminal charge, the time the person spent under indeterminate commitment as a mentally disordered sex offender shall be credited in fixing his term of sentence.

6326. If the opinion so certified is under subdivion (b) of Section 6325, the committing court shall forthwith order the return of the person to said committing court and shall thereafter cause the person to be returned to the court in which the criminal charge was tried to await further action with reference to such criminal charge.

Such court shall resume the proceedings and after considering all the evidence before it shall impose sentence or make such other disposition of the case as the court may deem necessary and proper; provided, that said court, if satisfied that the person has not recovered from his mental disorder and is still a danger to the health and safety of others, may recertify the person to the superior court of the county. If said court after hearing makes a finding that the person is still a mentally disordered sex offender and is still a danger to the health and safety of others, it may make an order recommitting the person for an indeterminate period to the Department of Mental Hygiene for placement in a state institution or institutional unit for the care and treatment of such mentally disordered sex offenders designated by the court. At such hearing or hearings, the person shall be entitled to present witnesses in his own behalf, to be represented by counsel and to cross-examine any witnesses who testify against him.

The Director of Mental Hygiene, with the approval of the Director of Corrections and the Director of Finance, may provide on the grounds of a state institution or institutions under the jurisdiction of the De-

partment of Corrections or the Department of Mental Hygiene one or more institutional units to be used for the custodial care and treatment of mentally disordered sex offeners. Each such unit shall be administered in the manner provided by law for the government of the institution in which such unit is established.

The court shall cause the person so recommitted to be delivered to the state institution or the institutional unit so designated. The person shall remain therein or in any other such institution or institutional unit to which he may be transferred by the Director of Mental Hygiene until the person is no longer a danger to the health and safety of others. Thereupon the proceedings set forth in Section 6325 shall be followed with respect to the certifying of an opinion to the committing court and the release of the person thereby.

6327. After a person has been committed for an indeterminate period to the department for placement in a state hospital as a mentally disordered sex offender and has been confined for a period of not less than six months from the date of the order of commitment, the committing court may upon its own motion or on motion by or on behalf of the person committed, require the superintendent of the state hospital to which the person was committed to forward to the committing court, within 30 days, his opinion under (a) or (b) of Section 6325, including therein a report, diagnosis and recommendation concerning the person's future care, supervision or treatment. After receipt of

the report, the committing court may order the return of the person to the court for a hearing as to whether the person is still a mentally disordered sex offender within the meaning of this article.

The hearing shall be conducted substantially in accordance with Sections 6306 to 6314, inclusive. If, after the hearing, the judge finds that the person has not recovered from his mental disorder and is still a danger to the health and safety of others, he shall order the person returned to the Department of Mental Hygiene under the prior order of commitment for an indeterminate period, or, if the opinion of the superintendent of the state hospital was under (b) of Section 6325, he may make and sign an order recommitting the person for an indeterminate period to the Department of Mental Hygiene for placement in a state institution or institutional unit for the care and treatment of such mentally disordered sex offenders designated by the court and provided pusuant to Section 6326. A subsequent hearing may not be held under this section until the person has been confined for an additional period of six months from the date of his return to the department. If the court finds that the person has recovered from his mental disorder to such an extent that he is no longer a danger to the health and safety of others, or that he will not benefit by further care and treatment in the hospital and is long a danger to the health and safety of others, the committing court shall

thereafter cause the person to be returned to the court in which the criminal charge was tried to await further action with reference to such criminal charge.

6328. The superintendent of a state hospital or person in charge of a county psychiatric facility may extend to any person confined therein pursuant to this article such of the privileges granted to other patients of the hospital or facility as are not incompatible with his detention or unreasonably conducive to his escape from custody.

6329. The district attorney of the county may appear on behalf of the people at any of the hearings held pursuant to this article.

6330. Every person ordered placed in a county facility or state hospital temporarily for observation pursuant to this article or committed for an indeterminate period to a state hospital or state institution as a mentally disordered sex offender, who escapes or attempts to escape therefrom, or who escapes or attempts to escape while being conveyed to or from such county facility, state hospital or state institution, is punishable by imprisonment in the state prison not to exceed five years or in the county jail not to exceed one year.

Chapter 7.5 (beginning with Section 311) added to Title 9 of Part 1 of the Penal Code by Calif. Stats. 1961, chap. 2147, page 4427:

Section 311 as am. Calif. Stats. 1970 chap. 1072 page 1098:

"311. As used in this chapter:

"(a) 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

"(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

"(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcrip-

tion or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means being aware of the character of the matter or live conduct.

"(f) 'Exhibit' means to show.

"(g) 'Obscene live conduct' means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming, where, taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance.

"(1) The predominant appeal to prurient interest of the conduct is judged with reference to average adults unless it appears from the nature of the conduct or the circumstances of its production, presentation or exhibition, that it is designed for clearly defined deviant sexual groups, in which

case the predominant appeal of the conduct shall be judged with reference to its intended recipient group.

"(2) In prosecutions under this chapter, where circumstances of production, presentation advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the conduct and can justify the conclusion that the conduct is utterly without redeeming social importance."

Section 311.2 as am. Calif. Stats. 1969 chap. 249, page 598:

"311.2. (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

"(b) The provisions of this section with respect to the exhibit of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

"311.4. Every person who, with knowledge that a person is a minor, or who, while in possession of

such facts that he should reasonably know that such person is a minor, hires, employs, or uses such minor to do or assist in doing any of the acts described in Section 311.2 is guilty of a misdemeanor."

Sec. 311.5 as am. Calf. Stats. 1969 chap. 249, page 599:

"311.5 Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material, or who in any manner promotes, the sale, distribution, or exhibition of matter represented or held out by him to be obscene, is guilty of a misdemeanor."

Sec. 311.6 as am. Calif. Stats. 1970 chap. 1072, page 1908 at p. 1909:

"311.6. Every person who knowingly engages or participates in, manages, produces, sponsors, presents or exhibits obscene live conduct to or before an assembly or audience consisting of at least one person or spectator in any public place or in any place exposed to public view, or in any place open to the public or to a segment thereof, whether or not an admission fee is charged, or whether or not attendance is conditioned upon the presentation of a membership card or other token is guilty of a misdemeanor.

"311.7. Every person who, knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, requires that the purchaser or consignee receive any obscene matter or who denies or threatens to deny

a franchise, revokes or threatens to revoke, or imposes any penalty, financial or otherwise, by reason of the failure of any person to accept obscene matter, or by reason of the return of such obscene matter, is guilty of a misdemeanor.

"311.8. It shall be a defense in any prosecution for a violation of this chapter that the act charged was committed in aid of legitimate scientific or educational purposes."

Sec. 311.9 as am. Calif. Stats. 1969 chap. 249, page 599:

"311.9 (a) Every person who violates Section 311.2 or 311.5 is punishable by fine of not more than one thousand dollars ($1,000) plus five dollars ($5) for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed ten thousand dollars ($10,000), or by imprisonment in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both such fine and imprisonment. If such person has previously been convicted of any offense in this chapter, or of a violation of Section 313.1, a violation of Section 311.2 or 311.5 is punishable as a felony.

"(b) Every person who violates Section 311.4 is punishable by fine of not more than two thousand dollars ($2,000) or by imprisonment in the county jail for not more than one year or by both such fine and such imprisonment. If such person

has been previously convicted of a violation of former Section 311.3 or Section 311.4 he is punishable by imprisonment in the state prison not exceeding five years.

"(c) Every person who violates Section 311.7 is punishable by fine of not more than one thousand dollars ($1,000) or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment. For a second and subsequent offense he shall be punished by a fine or not more than two thousand dollars ($2,000), or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. If such person has been twice convicted of a violation of this chapter, a violation of Section 311.7 is punishable as a felony.

"312. Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the district attorney or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control."

Sec. 312.1 as am. Calif. Stats. 1970 chap. 1072 page 1908 at p. 1910:

"312.1 In any prosecution for a violation of the provisions of this chapter or of Chapter 7.6 (commencing with Section 313), neither the prosecution nor the defense shall be required to introduce expert witness testimony concerning the obscene

or harmful character of the matter or live conduct which is the subject of any such prosecution. Any evidence which tends to establish contemporary community standards of appeal to prurient interest or of customary limits of candor in the description or representation of nudity, sex or excretion, or which bears upon the question of redeeming social importance, shall, subject to the provisions of the Evidence Code, be admissible when offered by either the prosecution or by the defense.

"312.5. If any phrase, clause, sentence, section or provision of this chapter or application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other phrase, clause, sentence, section, provision or application of this chapter, which can be given effect without the invalid phrase, clause, sentence, section, provision or application and to this end the provisions of this chapter are declared to be severable."

Chapter 7.6 (commencing with Section 313) added to Title 9 of Part 1 of the Penal Code by Calif. Stats. 1969 chap. 248 page 596:

"313. As used in this chapter:

"(a) 'Harmful matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description

or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance for minors.

"(1) When it appears from the nature of the matter or the circumstance of its dissemination, distribution or exhibition that it is designed for clearly defined deviant sexual groups, the predominant appeal of the matter shall be judged with reference to its intended recipient group.

"(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance for minors.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription, or mechanical, chemical, or electrical reproduction or any other articles, equipment, machines, or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means being aware of the character of the matter.

"(f) 'Exhibit' means to show.

"(g) 'Minor' means any natural person under 18 years of age."

Secs. 313.1 and 313.2, both as amended by Calif. Stats. 1970, chap 257, page 522:

"313.1. (a) Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit any harmful matter to the minor is guilty of a misdemeanor.

"(b) Every person who misrepresents himself to be the parent or guardian of a minor and thereby causes the minor to be admitted to an exhibition of any harmful matter is guilty of a misdemeanor.

"313.2. (a) Nothing in this chapter shall prohibit any parent or guardian from distributing any harmful matter to his child or ward or permitting his child or ward to attend an exhibition of any harmful matter if the child or ward is accompanied by him.

"(b) Nothing in this chapter shall prohibit any person from exhibiting any harmful matter to any of the following:

"(1) A minor who is accompanied by his parent or guardian.

"(2) A minor who is accompanied by an adult who represents himself to be the parent or guardian of the minor and whom the person, by the

exercise of reasonable care, does not have reason to know is not the parent or guardian of the minor.

"313.3. It shall be a defense in any prosecution for a violation of this chapter that the act charged was committed in aid of legitimate scientific or educational purposes.

"313.4. Every person who violates Section 313.1 is punishable by fine of not more than two thousand dollars ($2,000) or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. If such person has been previously convicted of a violation of Section 313.1 or any section of Chapter 7.5 (commencing with Section 311) of Title 9 of Part 1 of this code, he is punishable by imprisonment in the state prison for not exceeding five years.

"313.5. If any phrase, clause, sentence, section or provision of this chapter or application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other phrase, clause, sentence, section, provision or application of this chapter, which can be given effect without the invalid phrase, clause, sentence, section, provision or application and to this end the provisions of this chapter are declared to be severable."

Section 647 of the Penal Code, see page 7 *supra*.

Section 315 of the Penal Code as amended by Calif. Stats. 1905, chap. 507, page 668:

"315. Every person who keeps a house of ill-fame in this state, resorted to for the purpose of prostitution or lewdness, or who willfully resides

in such house, is guilty of a misdemeanor; and in all prosecutions for keeping or resorting to such a house common repute may be received as competent evidence of the character of the house, the purpose for which it is kept or used, and the character of the women inhabiting or resorting to it."

Section 316 of the Penal Code as amended by Calif. Stats. Code Amendments 1873-74, chap. 614, p. 430:

"316. Every person who keeps any disorderly house, or any house for the purpose of assignation, or prostitution, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is habitually disturbed, or who keeps any inn in a disorderly manner; and every person who lets any apartment or tenement, knowing that it is to be used for the purpose of assignation or prostitution is guilty of a misdemeanor."

Section 318 of the Penal Code as amended by Calif. Stats. Code Amendments 1880, chap. 94, page 40:

"318. Whoever, through invitation or device, prevails upon any person to visit any room, building, or other places kept for the purpose of gambling or prostitution, is guilty of a misdemeanor, and, upon conviction thereof, shall be confined in the county jail not exceeding six months, or fined not exceeding five hundred dollars, or be punished by both such fine and imprisonment."

APPENDIX "D"

Section 82.7 was added to, and Sections 322 and 329.4 of, Ordinance No. 5860 were amended by Ordinance No. 10,217 adopted February 23, 1971, effective March 26, 1971 to read respectively:

"Sec. 82.7. *Grounds for Denial. Activities which may Involve Free Speech.* The following shall constitute grounds for denial of a license for a bookstore, exhibition, traveling show, theatre, motion picture theatre, sound or advertising vehicle, model studio, picture arcade, entertainment as defined in Article 1 of Chapter XVII, male manager or Outdoor Festivals. This section does not apply to security guards as provided for in Section 3244.

"(a) The operation of the activity will not be carried on at a location and, if in a building or structure, in a building or structure, which location, building and structure comply with and meet all of the health, zoning, fire and safety requirements and standards of the laws of the State of California and ordinances of the County of Los Angeles applicable to such business operation.

"(b) The applicant, his employee, agent or any person connected or associated with the applicant as partner, director, officer, stockholder, associate or manager:

"(1) Has been convicted within the last five years in any court of competent jurisdiction of:

"(i) Any crime requiring registration under Section 290 of the Penal Code, or

"(ii) Any violation of Chapter 7.5 (beginning with Section 311) of Title 1 [9], Part 1 of the Penal Code, or

"(iii) Any violation of Chapter 7.6 (beginning with Section 313) of Title 9, Part 1 of the Penal Code, or

"(iv) Any violation of Paragraphs (a), (b), or (d) of Section 647 of the Penal Code, or

"(v) Any violation of Section 315, or 316, or 318 of the Penal Code, or

"(vi) Any offense involving the use of force or violence upon the person of another, or

"(vii) Any violation of any statute, this, or any other ordinance arising from the same or similar business operation, or

"(viii) Any offense involving the maintenance of a nuisance in connection with the same or similar business operation.

"(2) Has committed within the last five years any offense described in sub-paragraphs (i), (ii), (iii), (iv), (v), (vi), or (vii) of Paragraph (1) of this subsection.

"(3) Has allowed or permitted acts of sexual misconduct to be committed within prior business operations.

"(c) The applicant, his employee, agent or any person connected or associated with the applicant as partner, director, officer, stockholder, associ-

ate, or manager, has knowingly made any false, misleading or fraudulent statement of material fact in the application for a license or in any report or record required to be filed with the Tax Collector or Commission.

"(d) The applicant has had a similar type of license previously revoked for good cause within one year prior to the application, and can show no material changes in circumstances since such revocation.

"Sec. 322. *Grant or Denial of Bookstore License.* A license for a bookstore shall be granted or denied as provided in Section 82.7.

"Sec. 329.4. *Grant or Denial of Exhibition License.* A license for an exhibition shall be granted or denied as provided in Section 82.7."

LIBRARY
SUPREME COURT, U. S.

FILED
NOV 26 1971

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No. 71-577

THE MUNICIPAL COURT, etc.,

Petitioner,

vs. No. L.A. 29852

JAMES PERRINE,

Respondent.

THE MUNICIPAL COURT, etc., et al.,

Petitioners,

vs. No. L.A. 29860

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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STATEMENT OF THE CASE

Respondents, pursuant to a procedure authorized by the California Supreme Court

in Burton v. Municipal Court, 68 Cal. 2d 684, 68 Cal. Rptr. 721, 441 P. 2d 281 (1968), attacked the constitutionality of a Los Angeles County bookstore licensing ordinance (Ordinance No. 5860, set forth in detail in the Petition), by first violating it and then seeking writs of prohibition from the California Supreme Court restraining various municipal courts (petitioners herein) from trying respondents for such violations. The respondents operated their bookstores without first securing the license required by the ordinance, were then prosecuted for such violations, and the petitioners overruled demurrers challenging the constitutionality of the ordinance.

The California Supreme Court agreed with respondents that the ordinance was unconstitutional on its face, and issued peremptory writs of prohibition restraining their trials.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED IF ANY PORTION OF THE ORDINANCE IS INVALID

It is important to note that this case was presented to the highest state court by way of a petition for writ of prohibition, a procedure authorized by the California Supreme Court in Burton v. Municipal Court, supra, wherein the court stated, 68 Cal. 2d at 688:

"It is settled that a person has the standing to challenge a statute on the ground that it delegates overly broad licensing authority to an administrative officer whether or not his conduct could be proscribed by a properly drawn enactment and whether or not he has applied for a license. One who could have obtained a license for the asking may call into question the whole scheme of licensing when he is prosecuted for failure to procure it. Standing is recognized in such a situation because of the dangers inherent in tolerating, in the realm of the First Amendment, the existence of a penal statute susceptible of sweeping and improper application."

II CERTIORARI SHOULD BE DENIED BECAUSE PORTIONS OF THE ORDINANCE ARE INVALID

The sale of books, even in the context of commercial activity, is entitled to First Amendment protection. Smith v. California, 361 U.S. 147 (1959). The ordinance which is the subject of the instant case is invalid because it denies bookstore licenses to those persons who have been convicted of certain crimes in the past, such as obscenity. Thus, certain persons are completely deprived of their First Amendment rights because of past conduct, which is a clear prior restraint. Prior

restraints were condemned by this Court as recently as the "Pentagon Papers Case," New York Times Co. v. United States, ___ U. S. ___, 29 L. Ed. 2d 822 (1971).

The ordinance is likewise defective because, whether or not a person has been convicted of certain crimes, if the Public Welfare Commission determines that such person has committed any one of a number of acts (many of which are only vaguely described, and some of which may not actually be criminal) within five years (longer than the statute of limitations for many enumerated crimes) a license may be refused.

The ordinance is defective because at least some (perhaps all) of the acts or crimes bear no rational relationship to the operation of a bookstore.

There are many other defects in the ordinance, some of which are spelled out in the opinion of the California Supreme Court. Desire to keep this response brief precludes a complete listing of all the defects. Every time the ordinance is reread another defect comes to light. The ordinance belongs more in a law school constitutional law class or in a bar examination than in this Court's crowded docket.

Aside from the substantive defects, the ordinance is invalid, or was at the time respondents were first arrested, because it provides, or did provide, only that the Public Welfare Commission may grant a license

after certain findings are made. This defect alone invalidates the ordinance. See Appendix "A" to Petition, pp. 6-7. The California Supreme Court's interpretation of the word "may" is based upon California law and prior California rulings. Dillion v. Municipal Court, 4 Cal. 3d 860 (1971), and thus is not subject to review by this Court.

It is true that "may" was changed to "shall" by amendment to the ordinance (Appendix "D" to Petition), but that fact was brought to the attention of the California Supreme Court long before its decision on September 3, 1971. If the California Supreme Court did not see fit to consider the change, this Court should not.

III THE SEVERABILITY CLAUSE DOES NOT SAVE THE ORDINANCE

Petitioner's arguments concerning severability and the application of the ordinance to respondents completely miss the point made by Burton v. Municipal Court, supra, and the court below, and also fail to consider that it is a licensing ordinance, not a criminal statute, which is the subject of these proceedings. Concise answers to these contentions have previously been rendered by this Court as well as the California Supreme Court. It should suffice to set them forth herein:

In In re Porterfield, 28 Cal. 2d 91, 120 (1946), the California Supreme Court stated:

> "The potential severability of the ordinance, however, can have no effect upon the instant matter. As far as petitioner is concerned the existence of the statute as a whole was an operative fact. The consequences of its existence as such cannot be ignored. In order for petitioner to have secured a license he would have had to have complied with the terms of the ordinance as written."

Fifteen years earlier this Court stated in Smith v. Cahoon, 283 U.S. 553, 563 (1931):

> "The effect of this savings clause is merely that, if one provision is struck down as invalid others may stand. But until such separation has been accomplished by judicial decision, the statute remains with its inclusive purport, and those concerned in its application have no means of knowing definitely what eventually will be eliminated and what will be left."

CONCLUSION

Because of the change in the ordinance, the method by which the cases were brought to the California Supreme Court, the numerous defects in the ordinance, the failure of petitioners to demonstrate the compelling national importance of these cases, and because the decision of the California Supreme Court is correct and in complete accord with constitutional principles articulated by this Court, it is respectfully submitted that the Petition for Writs of Certiorari should be denied.

Respectfully submitted,

ROGER JON DIAMOND

Attorney for Respondents

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

IN THE
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October Term, 1971

No. 71-577

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Respondent.

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Respondents.

No. L.A. 29860

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71577

THE MUNICIPAL COURT OF THE EAST LOS ANGELES JUDICIAL DISTRICT, County of Los Angeles, State of California, Petitioner,

vs.

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vs.

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

OPENING STATEMENT

We join in the motion of the

Municipal Court of the East Los Angeles Judicial District, County of Los Angeles, State of California, seeking a review of two cases decided in the Supreme Court of the State of California, reported as follows:

Perrine v. Municipal Court, et al. (1971), 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (App. A);

Baker, et al. v. Municipal Court, et al. (1971), 5 Cal.3d 669, 97 Cal.Rptr. 328, 488 P.2d 656 (App. B).

I

THE CALIFORNIA SUPREME COURT BY ITS DECISION OF PERRINE V. MUNICIPAL COURT HAS GRANTED ABSOLUTE IMMUNITY TO A COMMERCIAL PURVEYOR OF SMUT NOTWITHSTANDING THE FACT THAT THE FIRST AMENDMENT HAS NEVER PROTECTED COMMERCIAL DISTRIBUTORS OF OBSCENE MATERIAL WHO HAVE BEEN CONVICTED IN A COURT OF COMPETENT JURISDICTION BY FINAL JUDGMENT OF AN OBSCENITY CHARGE.

In Perrine v. Municipal Court,

supra, James Perrine was convicted of a violation of §311.2 of the Penal Code which provides as follows:

> §311.2. [Sale or distribution, etc., of obscene matter: Penalty: Motion picture machine operator]
> (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.
> (b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator

or projectionist has no financial interest in the place wherein he is so employed.

Specifically, Mr. Perrine was charged as follows:

"Comes now the undersigned and states that he is informed and believes, and upon such information and belief declares: That on or about October 16, 1968, at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor, to-wit: violation of Section 311.2 of the Penal Code of the State of California was committed by James Perrine (whose true name to affiant is unknown), who at the time and place last aforesaid, did wilfully and unlawfully and knowingly send and cause to be sent, bring and cause to be brought into this state for sale and distribution, and in this state prepare, publish, print, exhibit, distribute, offer to distribute, and have in his possession with intent to distribute and to

exhibit and offer to distribute, obscene matter, to-wit: 2 reels of an obscene film (Reel A & B)."

This conviction was upheld by the Appellate Department of the Superior Court of the State of California. Thus, it is a final judgment of guilt by a court of competent jurisdiction. Thereafter, Mr. Perrine sought a permit to open a bookstore in the County of Los Angeles. In connection therewith, the California Supreme Court, in Perrine v. Municipal Court, 5 Cal.3d 656, at pages 663 through 665, states as follows:

> "Participants in the business of selling books require no special expertise. They are not like doctors or lawyers or school teachers whose past criminal convictions are often directly related to their occupational qualifications and may therefore be reasonably invoked to bar them from practicing their professions. (See, Werner v. State Bar (1944) 24 Cal.2d 611, [150 P.2d 892]; Bruns v. State Bar (1941) 18

Cal.2d 667 [117 P.2d 327]; Hallinan v. Committee of Bar Examiners (1966) 65 Cal.2d 447, 471-472 [55 Cal.Rptr. 228, 421 P.2d 76].) The ordinance in this case appears to be primarily concerned with persons who have been convicted of sex crimes or crimes of violence against the person, including the most trivial assaults and batteries. No showing has been made that such persons are in any way disqualified to participate in the operation of a bookstore or likely to abuse the right to do so to promote any criminal propensities that they may still possess. Sex crimes are not ordinarily committed in bookstores, and crimes of violence are much more likely to be committed against bookstorekeepers than by them in their shops. The ordinance's broad exclusion for past criminal convictions goes far beyond any constitutionally permitted restriction on the right to engage in a lawful

occupation or business.[9]

"It is contended, however, that at least as to crimes involving obscenity, there is a reasonable relationship between conviction of such crimes and the operation of a bookstore.[10]

---

[9] In reaching this decision, we intend to cast no doubt on the right of a legislative body to enact under the police power reasonable regulations, including the licensing of bookstores, which are specifically drawn to meet proper public purposes such as compliance with health, fire, and safety laws.

[10] The county is, however, somewhat inconsistent in its claims. It assures us that the ordinance is not designed to and "in no way regulates the contents of the books themselves." Yet it also makes the highly questionable and factually unsupported claim that a "person who has been convicted of selling or distributing obscene matter is less likely to comply with §311.2 of the Penal Code than a person who has not violated that section."

Accordingly, it is urged that the commission lawfully denied petitioner's application for a license on the basis of his conviction for violating Penal Code section 311.2. This contention cannot stand in the face of the First Amendment. (9) Since in a host of other contexts the ordinance directly and unconstitutionally restricts the right to engage in activities protected by the First Amendment, we cannot sustain its application to petitioner even though a narrowly drawn ordinance might constitutionally permit denying his application. (Burton v. Municipal Court, supra, 68 Cal.2d 684, 696; Thornhill v. Alabama, supra, 310 U.S. 88, 97-98 [84 L.Ed. 1093, 1099-1110].) (10) Moreover, since a denial of a license would prohibit petitioner from engaging in an activity protected by the First Amendment, it could only be justified, even under a narrowly drawn ordinance, if permitting a person who had been

convicted of a crime involving obscenity to operate bookstore constituted a clear and present danger of a serious, substantive evil. (Wirta v. Alameda-Contra Costa Transit District (1968) 68 Cal.2d 51, 60 [64 Cal.Rptr. 430, 434 P.2d 982]; Thomas v. Collins (1943) 323 U.S. 516, 530 [89 L.Ed. 430, 440, 65 S.Ct. 315]; Board of Education v. Barnette (1942) 319 U.S. 624, 639 [87 L.Ed. 1629, 1638, 63 S.Ct. 1178, 147 A.L.R. 674].) No such clear and present danger appears. We cannot assume that because petitioner was once convicted of violating Penal Code section 311.2, he will violate it again, or that if he does so, criminal sanctions will not afford an adequate remedy. (See, Near v. Minnesota, supra, 283 U.S. 697, 715 [75 L.Ed. 1357, 1367].) Appropriate to the facts of the present case are the comments of the United States Supreme Court in Bantam Books, Inc. v. Sullivan (1962) 372 U.S. 58, 66, 69-70 [9

L.Ed.2d 584, 590, 592-593, 83 S.Ct. 631], made with reference to a Rhode Island commission established, not to prohibit the distribution or sale of literature, but merely to notify publishers of material it deemed to be objectionable and to recommend prosecution: '[T]he Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. ... The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity. ... In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process. ... The Commission's practice is in striking contrast, in that it provides no safeguards whatever against the

suppression of the nonobscene, and therefore constitutionally protected matter. It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.'

"To interpret the ordinance in this case to permit denial of a license because of a past conviction of violating Penal Code section 311.2 would do more than create a hazard to protected freedoms; it would suppress them altogether. The penalty for violating section 311.2 does not include a forfeiture of First Amendment rights, and the risk that criminal sanctions will be insufficient to deter future violations of that section cannot justify the county's attempted forfeiture of those rights on the theory that past violators are unfit to operate bookstores."

If language such as this is to be

the basis for licensing and/or regulation, then it is respectfully submitted that the appellate courts have judicially legislated law enforcement agencies and public entities out of regulating and/or licensing those who commercially purvey smut, preying upon the weaknesses of humanity where no censorship whatsoever is practiced by either the law enforcement agencies or the public entities.

In order to understand the magnitude of the Perrine decision, one must realize the facts upon which the prosecution was predicated. A brief summary of such facts is as follows:

During the month of October, 1968, the North Hollywood Vice Unit of the Los Angeles Police Department received information from numerous persons, that the owner of "Kenosha West" at 11021 Magnolia, was selling obscene books, pictures and films. In response thereto, Vice Officers of the Los Angeles Police Department commenced an investigation. On October 5, 1968, a police woman in civilian clothing entered the aforementioned establishment and ascertained that

the only person therein was an employee who identified himself as "Pierre". The police woman told Pierre that she was interested in buying some party films. Pierre removed a reel of 8mm film from under the counter of the cashier's booth at which he was seated. She was also given a hand projector with which to view the film. This film showed two nude females, one kissing the other's body between the breasts but not touching the breast. Pierre further stated that he had a real good film called "Man/Woman" and that these persons really got hot and close. The police woman, however, stated that she had seen better films in Florida and that the price was immaterial so long as the films were really good, and since he did not have any good films, she would take her business elsewhere. At this time, Pierre stated he was not the owner and that the owner was usually there between the hours of 5:00 and 6:00 p.m. and if she returned, the owner would be able to accommodate her. The police woman returned at approximately 7:15 p.m. and observed a male caucasian (later

identified as James Perrine) standing in the open doorway of a kitchen located at the north end of the building. She asked Mr. Perrine if he were the owner and he replied, "No". She stated that she had been told by Pierre to return about 6:00 p.m. to talk to the owner about some party films. Mr. Perrine grasped the police woman by the arm and, after taking her into the kitchen, asked what she wanted in the way of films. The police woman replied that she wanted something more than he had in front. Mr. Perrine then stated, "You mean you want balling (sexual intercourse) and sucking (oral copulation)?" She replied, "Yes". When Perrine asked what kind of party, she replied, "Three girls and six men." Mr. Perrine then asked the police woman if she would be interested in making some money on the side, saying that he knew of a party with six men and six women where the police woman would be paid $100 for the night. Perrine stated that "at the party the broads are balled (sexual intercourse) and blow (oral copulation) the different guys". He

asked for her home telephone number so he could give her some business as he had many guys coming in his store looking for girls. She declined. Not being satisfied, Mr. Perrine stated that he knew a lesbian whom he had tried to set up with a hippie-type customer for $100.00. He, on several occasions, stated that the lesbian would pay $100 for another woman to "eat her" (oral copulation). Being unsuccessful in this attempted commercial activity, Mr. Perrine agreed to get several films for her. These films are "Candy Barr" and "Village Swappers". He described these films as follows:

> "CANDY BARR: Candy is sitting by the pool, a man who is watching her comes over and takes her to his room and balls her when she refuses to blow him he gets another girl to do so while he eats Candy Barr.
>
> "VILLAGE SWAPPERS: Two couples that switch around. In this film one guy comes (ejaculates) in a girl's mouth. She takes it (ejaculation) out and drops it in the mouth of the other girl."

Mr. Perrine stated further that she could also have a film, "The Nun" for $130.00. The police woman stated she would return the next day to pick up the film "Village Swappers" at the price of $130.00. The police woman returned the next day at approximately 6:45 p.m. and again Mr. Perrine asked her if she would turn a trick (an act of sexual intercourse or oral copulation for compensation), which she refused. Shortly thereafter, the police woman paid the $130.00 and, when she returned to her car, discovered that the film "Village Swappers" was on the front seat.

It is respectfully requested that if there be any doubt as to the obscenity and the commercial aspects of Mr. Perrine in his commercial enterprises, that this film be viewed by this Court. This film, presently in evidence, consists of two reels, Reel A and Reel B. A brief disclosure of the contents is as follows:

Reel A. There are two female caucasians and two male caucasians. The two female caucasians are swaying back and

forth as they remove all their clothes. The dark-haired girl takes a "Dildo" (a simulated erected penis) and attaches it to her waist. The blonde girl stands in front of her as the dark-haired girl inserts the Dildo between her legs. They embrace each other and begin to have undulating motions causing the Dildo to move back and forth between the blonde's legs. The dark-haired girl removes the Dildo and the blonde girl gets on her knees and places her face into the vaginal area of the dark-haired girl and orally copulates her vagina. The film continues to depict the two males and females in various acts of sexual intercourse and oral copulation, commonly referred to as a daisy chain. It also depicts the females in acts of oral copulation of each other.

Reel B. A camera focuses on a female lying on her back with a male on top of her engaged in various positions of sexual intercourse, while the other male is engaged in various positions of oral copulation. Further scenes depict the blonde engaged in the act of orally

copulating the erected penis of a male while, at the same time, the male is orally copulating the dark-haired girl. The male appears to reach a climax in the mouth of the blonde female, who then leans over the dark-haired girl's open mouth. The blonde opens her mouth and deposits what appears to be semen into the open mouth of the dark-haired girl. The dark-haired girl leans forward and swallows the deposited material. Thereafter, a male and the dark-haired girl engage in an act of sexual intercourse, and the male thereafter engages in orally copulating the dark-haired female. The final scene shows a male engaged in an act of sexual intercourse with a female and thereafter the camera focuses on a female with her legs spread apart, and a close-up of her vagina with the semen oozing out of it.

One of the basic purposes of regulation and/or licensing is to protect the public from victimization by illegal practices. If prior conduct (in the form of a criminal conviction) is excluded as a rational basis to determine

these propensities, the ability to protect the public is non-existent. The inescapable consequences are that crime prevention and public protection are unachievable in this area and victimization will increase in geometric proportion. We do not mean to say or imply that public entities and/or law enforcement agencies should be censors but most certainly where an individual has been convicted of a crime as in this instance, it is illogical and absurd to state that this man should be able to continue in a business under the guise of the First Amendment. The First Amendment was never intended to, nor designed to, protect the commercial purveyor of filth. Because of this decision, and other appellate court decisions, extending so-called First Amendment protection to commercial beer bars, taverns and saloons, we have had the following types of commercial activities commence:

1. Girls standing on the beer bar completely nude, wrapping their legs around the shoulders of individuals who are allowed to peek and stare.

2. In other business establishments similar nudity occurs in a darkened atmosphere, with the entrepreneur, at an increase in price, renting flashlights to the beer bar patrons to shine into the vaginal area.

3. The dipping of the exposed nipple into the beer for an increased price.

4. Acts of intercourse in the bar.

5. Acts of oral copulation.

6. Open invitations for audience participation in various acts of sexual conduct with the so-called entertainers.

7. If there were no acceptors of such participation, an offer to pay any member of the audience to so participate would occur.

8. Needless to say, now such activity has been extended to homosexual bars which now have male nudes who are completely exposed.

9. Acts of sodomy.

10. Acts of masturbation.

These are just some of the activities that have occurred because of the so-called protection afforded these commercial parasites under the guise of the First Amendment which exceed the imagination even of an artist with his pen exercising "poetic license".

We mention these facts and the activities that are occurring not to incite your passion or prejudice, but to fully inform you of the nature and extent of the commercial activity in this area and to hopefully acquaint you with the utter frustration of law enforcement agencies to cope with such activities and request that a more realistic standard of obscenity and First Amendment rights be enunciated by this Honorable Court.

To express it another way, we believe that the First Amendment should not be used to permit commercial enterprises to conduct their operations in such a manner as to permit and to continue to permit the commission of sex crimes, and we further believe that a

muncipality should be vested with the authority to deny or revoke a permit when such a business enterprise or its employees have been convicted by a court of competent jurisdiction in a final judgment on an obscenity charge directly related to the business activities. It is our contention that the First Amendment was not designed to condone criminal sexual activities nor to permit customers to engage in public masturbation and various other sordid sexual crimes.

II

CONSENT TO THE FILING OF A BRIEF AMICUS CURIAE NEED NOT BE HAD WHEN THE BRIEF IS PRESENTED FOR A POLITICAL SUBDIVISION OF A STATE SPONSORED BY THE AUTHORIZED LAW OFFICER THEREOF.

Rule 42 of Rules of the United States Supreme Court.

Respectfully submitted,

ROGER ARNEBERGH, City Attorney
JOHN A. DALY, Executive Assistant City Attorney
GEORGE J. FRANSCELL, Assistant City Attorney

As Amici Curiae

[L.A. No. 29852. In Bank. Sept. 3, 1971.]

JAMES PERRINE, Petitioner, v.
THE MUNICIPAL COURT FOR THE EAST LOS ANGELES JUDICIAL DISTRICT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE, Real Party in Interest.

SUMMARY

In a hearing on petitioner's application for a bookstore license required by a county ordinance, he admitted a conviction of violation of Pen. Code, § 311.2, proscribing the sale, distribution or exhibition of obscene matter. His application was denied, but without opinion. He then proceeded to operate without a license and was charged with violations of the ordinance. He sought a writ of prohibition from the Supreme Court to restrain further criminal proceedings on the charged violations.

The Supreme Court issued the writ, holding that the licensing ordinance was unconstitutional, on its face, as setting no adequate standards for issuing licenses and as an invalid prior restraint on the exercise of freedoms guaranteed by the First Amendment. The Court also noted that it is constitutionally impermissible to deny an application for a license to operate a bookstore solely on the ground that the applicant has suffered a prior criminal conviction. (Opinion by Wright, C. J., with Peters, Tobriner, Mosk, and Sullivan, JJ., concurring. Separate dissenting opinion by Burke, J., with McComb, J., concurring therein.)

HEADNOTES

Classified to McKinney's Digest

(1) **Licenses § 12(0.5)—License of Occupations and Privileges—Validity of Ordinances—License To Operate Bookstore.**—Los Angeles County Ordinance 5860, § 321, prohibiting the operation of a bookstore without a specified license, constitutes an invalid prior restraint on the exercise of freedoms guaranteed by the First Amendment, sets no

adequate standards for issuing licenses, and is, therefore, unconstitutional on its face.

(2) **Constitutional Law § 120—Fundamental Rights, Privileges and Immunities—Right To Engage in Occupations—Operation of Bookstore —Effect of Criminal Conviction.**—It is constitutionally impermissible to deny an applicant a license to operate a bookstore solely on the ground that he has suffered a prior criminal conviction.

(3) **Constitutional Law § 120—Fundamental Rights, Privileges and Immunities—Right To Engage in Occupations—Selling or Distributing Books.**—Although the activity of selling or distributing books is not exempt from reasonable regulation, it is entitled to First Amendment protection.

(4) **Licenses § 8 — License of Occupations and Privileges — Power To License or Tax—Subdelegation of Authority—Need for Guidelines.**—Statutes which authorize public officials to license conduct protected by the First Amendment must set forth definite, objective guidelines for the issuance of such licenses.

(5) **Licenses § 8 — License of Occupations and Privileges — Power To License or Tax—Subdelegation of Authority—First Amendment Activities—Sufficiency of Guidelines.**—The danger of censorship and arbitrary suppression, of conduct protected by the First Amendment, in resolving an application for a license through the employment of such imprecise standards as the applicant's "good character," or the anticipated effect of his conduct on "public welfare or morals," or the "sacrilegious" or "cruel, obscene, indecent or immoral" nature of subject matter sought to be distributed, is so great that the voiding of regulations employing such standards is required, even in the absence of proof of actual discrimination.

(6) **Licenses § 33—License of Occupations and Privileges—Application for and Issuance of Licenses—Discretion To Grant or Refuse Licenses —Unlimited Discretion as Voiding Statute.**—Since statutes which accord officials excessive discretion are unconstitutional on their face, those which vest unlimited discretionary power to issue or deny permits to engage in First Amendment activities are, a fortiori, unconstitutional.

(7) **Constitutional Law § 120—Fundamental Rights, Privileges and Immunities — Right To Engage in Occupations — Requirements for**

Regulatory Ordinance.—Even in the absence of First Amendment considerations, an ordinance regulating the right to engage in a lawful occupation or business must bear a rational relationship to a valid governmental purpose.

[See **Cal.Jur.2d**, Constitutional Law, § 197.]

(8) **Licenses § 18—License of Occupations and Privileges—Classification—Relation of Standards to Qualifications.**—Licensing standards for excluding persons from a lawful occupation or business must bear some reasonable relation to the persons' qualifications to engage in those activities.

(9) **Licenses § 11—License of Occupations and Privileges—Validity and Construction of Laws—As Applied to Particular Situation or Individual.**—A licensing ordinance which, in a host of contexts, directly and unconstitutionally restricts the right to engage in activities protected by the First Amendment will not be sustained in its application to a particular individual, even though a narrowly drawn ordinance might constitutionally permit denying his application for a license.

(10) **Constitutional Law § 116(6)—Fundamental Rights, Privileges and Immunities—Freedom of Expression—Test of Valid Limitation on Free Expression—"Clear and Present Danger."**—The denial of a license to engage in an activity protected by the First Amendment, such as the selling of books, on the ground that the applicant had been convicted of a crime involving obscenity could be justified only if permitting such a person to operate such a store constituted a clear and present danger of a serious, substantive evil.

COUNSEL

Roger Jon Diamond for Petitioner.

John D. Maharg, County Counsel, and Edward H. Gaylord, Assistant County Counsel, for Respondent.

No appearance for Real Party in Interest.

OPINION

WRIGHT, C. J.—Petitioner seeks a writ of prohibition to restrain respondent court from taking further proceedings in criminal actions charging him with violating Los Angeles County Ordinance 5860, section 321[1] which prohibits the operation of a bookstore without first securing a license from the Los Angeles County Public Welfare Commission. **(1)** Since the ordinance sets no adequate standards for issuing licenses we conclude that it constitutes an invalid prior restraint on the exercise of freedoms guaranteed by the First Amendment and is therefore unconstitutional on its face. **(2)** We also hold that it is constitutionally impermissible to deny an applicant a license to operate a bookstore solely upon the ground that he has suffered a prior criminal conviction.

The facts are not in dispute. For several years petitioner has been engaged in the business of selling books and magazines in Los Angeles County at various leased locations. On November 28, 1969, Los Angeles County adopted an ordinance requiring that every person operating a bookstore procure a license and pay a license fee of $25. (Los Angeles County Ordinance 5860, §§ 321, 322.)[2] It provides that operating a bookstore without a license is a misdemeanor and that each day's unlicensed operation constitutes a separate offense. (Los Angeles County Ordinance 5860, §§ 7, 13.)[3] Sections 329.2 and 329.4[4] set forth provisions for grant-

[1]"Sec. 321 (9897 11-28-69) *Bookstore.* Every person conducting a bookstore the principal business of which is the sale of books or the sale of books and periodicals shall first procure a license and pay a license fee of twenty-five dollars. This section does not apply to the sale of books or periodicals as an incident to some other business or occupation."

[2]See footnote 1, supra, for section 321. "Sec. 322. (9897 11-28-69) *Grant or Denial of Bookstore License.* A license for a bookstore shall be granted or denied as provided in Section 329.4."

[3]"Sec. 7. *Misdemeanor to engage in licensed activity without a license.* Every person who engages in, conducts, manages, or carries on any business or other activity for which a license is required by this ordinance without first having procured a license so to do and having paid the fee if any for such license as in this ordinance provided, is guilty of a misdemeanor.

"Sec. 13. *Violation Punishment.* Any person violating any of the provisions of this ordinance or of any regulation imposed pursuant thereto is guilty of a misdemeanor punishable by a fine of not exceeding five hundred dollars or by imprisonment in the County Jail for a period not exceeding six months, or by both such fine and imprisonment. Each such person is guilty of a separate offense for every day during any portion of which any violation of any of the provisions of this ordinance or of any such regulation is committed, continued or permitted by such person, and shall be punished therefor as provided by this ordinance."

[4]"Sec. 329.2 (9557 5-31-68) *Exhibition—Hearing.* Except as otherwise provided in Section 63, a license required by Section 329 shall not be granted until the Public

ing or denying a license. Petitioner applied for a bookstore license in December 1969. After two continuances the county public welfare commission held a hearing on April 21, 1970, at which time petitioner admitted a 1968 conviction for violation of Penal Code section 311.2 (selling, distributing, or exhibiting obscene matter). At the hearing the Los Angeles County Sheriff urged that section 329.4, subdivision (b)(1)(ii) required that petitioner's application be denied because of his 1968 conviction. The matter was taken under submission, and on May 20, 1970, the commission denied the application without opinion.

Pursuant to Los Angeles County Ordinance 5860, article 9.5, petitioner appealed the commission's decision to the license appeals board, which denied the appeal without opinion on September 21, 1970. While the appeal was pending petitioner was twice arrested and charged with operating a bookstore without a license. Petitioner filed demurrers to the complaints on the ground that the ordinance is unconstitutional. The demurrers were overruled and a trial date set. Petitioner seeks by this peti-

Welfare Commission or its hearing officers holds a public hearing, notice of the time and place of which shall be given to the applicant as required by Section 101."

Section 329.4, made applicable to bookstores by section 322, provides: "(9947 2-20-70) *Granting License.* The Commission may grant a license for an exhibition if, either after a public hearing or pursuant to Section 63 it finds:

"(a) The operation of the exhibition will be carried on at a location and, if in a building or structure, in a building or structure, which location, building and structure comply with and meet all of the health, zoning, fire and safety requirements and standards of the laws of the State of California and ordinances of the County of Los Angeles applicable to such business operation.

"(b) The applicant, his employee, agent or any person connected or associated with the applicant as partner, director, officer, stockholder, associate or manager:

"(1) Has not been convicted within the last five years in any court of competent jurisdiction of: (i) Any crime requiring registration under Section 290 of the Penal Code, or (ii) Any violation of Chapter 7.5 (beginning with Section 311) of Title 9, Part 1 of the Penal Code, or (iii) Any violation of Chapter 7.6 (beginning with Section 313) of Title 9, Part 1 of the Penal Code, or (iv) Any violation of Paragraphs (a), (b), or (d) of Section 647 of the Penal Code, or (v) Any violation of Section 315, or 316, or 318 of the Penal Code, or (vi) Any offense involving the use of force or violence upon the person of another, or (vii) Any offense involving the maintenance of a nuisance in connection with the same or similar business operation.

"(2) Has not committed within the last five years any offense described in subparagraphs (i), (ii), (iii), (iv), (v), or (vi) of Paragraph (1) of this subsection.

"(3) Has not allowed or permitted acts of sexual misconduct to be committed within prior business operations.

"(c) The applicant, his employee, agent or any person connected or associated with the applicant as partner, director, officer, stockholder, associate, or manager, has not knowingly made any false, misleading or fraudulent statement of material fact in the application for a license or in any report or record required to be filed with the Tax Collector or Commission.

"(d) The applicant has not had a similar type of license previously revoked for good cause within one year prior to the application, or if he has, he also has shown material changes in circumstances since such revocation."

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tion for writ of prohibition to restrain respondent court from proceeding with the trials.[5]

Petitioner challenges the validity of the county ordinance on several grounds. His principal contentions are (1) that the absence of objective and definite standards for the issuance of a license renders the ordinance unconstitutional on its face; (2) that the ordinance improperly conditions the issuance of bookstore licenses upon qualifications that have no reasonable relationship to the occupation of selling books; and (3) that in any event it is constitutionally impermissible to prohibit a person from selling books solely on the basis of a past criminal conviction or convictions. Since there is merit in these contentions we find it unnecessary to consider petitioner's other contentions.

(3) Although the activity of selling or distributing books is not exempt from reasonable regulation, it is entitled to First Amendment protection (*Smith* v. *California* (1959) 361 U.S. 147, 150 [4 L.Ed.2d 205, 209, 80 S. Ct. 215]; see *Near* v. *Minnesota* (1930) 283 U.S. 697, 720 [75 L.Ed. 1357,1369, 51 S.Ct. 625]; *Burton* v. *Municipal Court* (1968) 68 Cal.2d 684, 689 [68 Cal.Rptr. 721, 441 P.2d 281]). **(4)** Statutes which authorize public officials to license conduct protected by the First Amendment must set forth definite, objective guidelines for the issuance of such licenses. (*Staub* v. *City of Baxley* (1958) 355 U.S. 313, 321 [2 L.Ed.2d 302, 310, 78 S.Ct. 277]; *Schneider* v. *State* (1938) 308 U.S. 147, 162 [84 L.Ed. 155, 161, 60 S.Ct. 146]; *Hague* v. *C.I.O.* (1939) 307 U.S. 496, 516 [83 L.Ed. 1423, 1437, 59 S.Ct. 954]; *Interstate Circuit, Inc.* v. *City of Dallas* (1968) 390 U.S. 676, 682 [20 L.Ed.2d 225, 230, 88 S.Ct. 1298]; *Thornhill* v. *Alabama* (1940) 310 U.S. 88, 97-98 [84 L.Ed. 1093, 1099-1100, 60 S.Ct. 736]; *Burton* v. *Municipal Court, supra,* 68 Cal.2d 684, 689.) Accordingly statutes which have empowered public officials to exercise their discretionary authority with respect to First Amendment activities in light of the applicant's "good character" (*Schneider* v. *State, supra,* 308 U.S. 147, 158 [84 L.Ed. 147, 163]; *In re Porterfield* (1946) 28 Cal.2d 91, 111 [168 P.2d 706, 167 A.L.R. 675]), the anticipated effect of his conduct upon the "public welfare or morals" (*Staub* v. *City of Baxley, supra,* 355 U.S. 313, 315 [2 L.Ed.2d 302, 307]; *Shuttlesworth* v. *Birmingham* (1969) 394 U.S. 147, 151 [22 L.Ed.2d 162, 167, 89 S.Ct. 935]) and the "sacrilegious" or "cruel, obscene, indecent or immoral" nature of the subject matter to be distributed (*Joseph Burstyn, Inc.* v. *Wilson* (1952) 343 U.S. 495, 506 [96 L.Ed. 1098, 1108, 72 S.Ct. 777]; *Holmby Productions, Inc.* v. *Vaughn* (1955) 350 U.S. 870 [100 L.Ed. 770, 76 S.Ct. 117])

[5]Petitioner has standing to challenge the constitutionality of the ordinance even though he has not been convicted of violating it. (*Burton* v. *Municipal Court* (1968) 68 Cal.2d 684, 688 [68 Cal.Rptr. 721, 441 P.2d 281].)

have been held to be unconstitutionally vague and overbroad. (5) The danger of censorship and arbitrary suppression inherent in the employment of such imprecise standards is so great that the voiding of these regulations is required even in the absence of proof of actual discrimination (*Burton* v. *Municipal Court, supra,* 68 Cal.2d 684, 696; *Interstate Circuit, Inc.* v. *Dallas, supra,* 390 U.S. 676, 689-690 [20 L.Ed.2d 225, 234-235]). (6) Since statutes which accord officials excessive discretion are unconstitutional on their face, a fortiori, those which vest unlimited discretionary power to issue or deny permits to engage in First Amendment activities are unconstitutional. (*Kunz* v. *New York* (1948) 334 U.S. 558 [93 L.Ed. 1115, 69 S.Ct. 930]; *Lovell* v. *Griffin* (1938) 303 U.S. 444 [82 L.Ed. 949, 58 S.Ct. 666].)

The Los Angeles County bookstore licensing ordinance fails to provide the necessary safeguards as it sets *no* standards governing the issuance of a license. By its terms section 329.4 provides that the commission *may* grant a license if it finds that none of the disqualifying factors exist.[6] Thus there is "no guarantee that a permit will issue even if the application meets all of the . . . conditions of the section" (*Dillon* v. *Municipal Court,* 4 Cal.3d 860, 870 [94 Cal.Rptr. 777, 484 P.2d 945]). The county insists that the ordinance does not confer such discretion upon the commission and that it must grant a license if the conditions are satisfied. Not only is such a construction inconsistent with past judicial interpretation (*Dillon* v. *Municipal Court, supra,* at pp. 870-871) and with accepted definitions,[7] it flies in the face of section 29 of the ordinance which clearly defines "may" as permissive and "shall' as mandatory.[8] The only reasonable conclusion is that the ordinance as written confers on the public welfare commission virtually unlimited authority to deny any application for a bookstore license. No other reading of the provisions of the ordinance is intellectually supportable.

The county contends that the language of section 329.4 that "the Commission may grant [a license] if . . . it finds" that none of the disqualifying factors exist clearly implies that it must deny a license unless it can make such a finding. Accordingly, it concludes that as to persons who are disqualified, the commission has no discretion and that therefore the ordinance is valid insofar as it prohibits granting licenses to such persons. As so interpreted, however, the ordinance would nevertheless leave vast dis-

[6]Section 329.4 provides: "*Granting License.* The Commission may grant a license for an exhibition if . . ."

[7]Webster's New Twentieth Century Dictionary (2d ed.): "may, v.: might, . . . contingency, as in clause of purpose, result, concession, or condition; . . ."

[8]"Sec. 29. '*Shall*' and '*May*'. 'Shall' is mandatory and 'May' is permissive."

cretion to the commission. The ordinance does not define what showing the commission could demand that the applicant satisfied the host of qualifications set forth in section 329.4. Its application is therefore fraught with dangers of invidious discrimination. Moreover, many of the subdivisions of section 329.4 are themselves fatally vague. Subdivisions (b) and (c) do not define who may be deemed an "associate" of the applicant whose conduct may disqualify the applicant. Subdivision (b) (3) does not define what constitutes "acts of sexual misconduct," and is therefore unconstitutionally vague. (See, e.g., *Interstate Circuit, Inc.* v. *Dallas, supra,* 390 U.S. 676, 688-690 [20 L.Ed.2d 225, 234-235] ["sexual promiscuity"]; *Holmby Productions, Inc.* v. *Vaughn* (1955) 350 U.S. 870 [100 L.Ed. 770, 76 S.Ct. 117] ["indecent, immoral"]; *Commercial Pictures Corp.* v. *Regents* (1954) 346 U.S. 587 [98 L.Ed. 329, 74 S.Ct. 286] ["cruel, obscene"].) Finally, the commission is not limited to denying a license on the basis of a conviction of any of the enumerated crimes, but must determine whether the applicant or any of his associates have committed any of those crimes, a determination that may be fraught with uncertainty, particularly in the area of crimes involving obscenity.

Moreover, we believe that even if the ordinance limited its disqualification to applicants who had either been convicted of one or more of the enumerated crimes or whose adequately defined coparticipants in the proposed business had been so convicted it would nevertheless be invalid.

(7) Even in the absence of First Amendment considerations, an ordinance regulating the right to engage in a lawful occupation or business must bear a rational relationship to a valid governmental purpose. (*Skaggs* v. *Oakland* (1936) 6 Cal.2d 222, 224-225 [57 P.2d 478]; *Laurel Hill Cemetery* v. *City of San Francisco* (1907) 152 Cal. 464, 470 [93 P. 70], affd. 216 U.S. 358 [54 L.Ed. 515].) **(8)** Accordingly, standards for excluding persons from engaging in such commercial activities must bear some reasonable relation to their qualifications to engage in those activities. (*Morrison* v. *State Board of Education* (1969) 1 Cal.3d 214, 234-235 [82 Cal.Rptr. 175, 461 P.2d 375].) In the present case we perceive no reasonable relation between the qualifications of an applicant to operate a bookstore and any past conviction of any of the vast number of crimes listed in section 329.4 he or any of his coparticipants may have suffered.

Participants in the business of selling books require no special expertise. They are not like doctors or lawyers or school teachers whose past criminal convictions are often directly related to their occupational qualifications and may therefore be reasonably invoked to bar them from practicing their professions. (See, *Werner* v. *State Bar* (1944) 24 Cal.2d 611 [150 P.2d 892]; *Bruns* v. *State Bar* (1941) 18 Cal.2d 667 [117 P.2d 327]; *Halliran*

v. *Committee of Bar Examiners* (1966) 65 Cal.2d 447, 471-472 [55 Cal. Rptr. 228, 421 P.2d 76].) The ordinance in this case appears to be primarily concerned with persons who have been convicted of sex crimes or crimes of violence against the person, including the most trivial assaults and batteries. No showing has been made that such persons are in any way disqualified to participate in the operation of a bookstore or likely to abuse the right to do so to promote any criminal propensities that they may still possess. Sex crimes are not ordinarily committed in bookstores, and crimes of violence are much more likely to be committed against bookstorekeepers than by them in their shops. The ordinance's broad exclusion for past criminal convictions goes far beyond any constitutionally permitted restriction on the right to engage in a lawful occupation or business.[9]

It is contended, however, that at least as to crimes involving obscenity, there is a reasonable relationship between conviction of such crimes and the operation of a bookstore.[10] Accordingly, it is urged that the commission lawfully denied petitioner's application for a license on the basis of his conviction for violating Penal Code section 311.2. This contention cannot stand in the face of the First Amendment. **(9)** Since in a host of other contexts the ordinance directly and unconstitutionally restricts the right to engage in activities protected by the First Amendment, we cannot sustain its application to petitioner even though a narrowly drawn ordinance might constitutionally permit denying his application. (*Burton* v. *Municipal Court, supra,* 68 Cal.2d 684, 696; *Thornhill* v. *Alabama, supra,* 310 U.S. 88, 97-98 [84 L.Ed. 1093, 1099-1110].) **(10)** Moreover, since a denial of a license would prohibit petitioner from engaging in an activity protected by the First Amendment, it could only be justified, even under a narrowly drawn ordinance, if permitting a person who had been convicted of a crime involving obscenity to operate a bookstore constituted a clear and present danger of a serious, substantive evil. (*Wirta* v. *Alameda-Contra Costa Transit District* (1968) 68 Cal.2d 51, 60 [64 Cal.Rptr. 430, 434 P.2d 982]; *Thomas* v. *Collins* (1943) 323 U.S. 516, 530 [89 L.Ed. 430, 440, 65 S.Ct. 315]; *Board of Education* v. *Barnette*

[9]In reaching this decision we intend to cast no doubt on the right of a legislative body to enact under the police power reasonable regulations, including the licensing of bookstores, which are specifically drawn to meet proper public purposes such as compliance with health, fire, and safety laws.

[10]The county is, however, somewhat inconsistent in its claims. It assures us that the ordinance is not designed to and "in no way regulates the contents of the books themselves." Yet it also makes the highly questionable and factually unsupported claim that a "person who has been convicted of selling or distributing obscene matter is less likely to comply with § 311.2 of the Penal Code than a person who has not violated that section."

(1942) 319 U.S. 624, 639 [87 L.Ed. 1629, 1638, 63 S.Ct. 1178, 147 A.L.R. 674].) No such clear and present danger appears. We cannot assume that because petitioner was once convicted of violating Penal Code section 311.2, he will violate it again, or that if he does so, criminal sanctions will not afford an adequate remedy. (See *Near* v. *Minnesota, supra,* 283 U.S. 697, 715 [75 L.Ed. 1357, 1367].) Appropriate to the facts of the present case are the comments of the United States Supreme Court in *Bantam Books, Inc.* v. *Sullivan* (1962) 372 U.S. 58, 66, 69-70 [9 L.Ed.2d 584, 590, 592-593, 83 S.Ct. 631], made with reference to a Rhode Island commission established, not to prohibit the distribution or sale of literature, but merely to notify publishers of material it deemed to be objectionable and to recommend prosecution: "[T]he Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. . . . The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity. . . . In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process. . . . The Commission's practice is in striking contrast, in that it provides no safeguards whatever against the suppression of the nonobscene, and therefore constitutionally protected matter. It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."

To interpret the ordinance in this case to permit denial of a license because of a past conviction of violating Penal Code section 311.2 would do more than create a hazard to protected freedoms; it would suppress them altogether. The penalty for violating section 311.2 does not include a forfeiture of First Amendment rights, and the risk that criminal sanctions will be insufficient to deter future violations of that section cannot justify the county's attempted forfeiture of those rights on the theory that past violators are unfit to operate bookstores.

Since the licensing ordinance is unconstitutional on its face, respondent court lacks jurisdiction of the criminal proceedings against petitioner.

Let a peremptory writ of prohibition issue as prayed.

Peters, J., Tobriner, J., Mosk, J., and Sullivan, J., concurred.

BURKE, J.—I dissent. I agree with the majority's determination that the ordinance in question lacked sufficient standards to guide the commission's discretion in granting or denying a license in those cases wherein

none of the enumerated disqualifying factors (e.g., prior conviction of obscenity offense) exists. In the instant case, however, Perrine had been convicted of a prior obscenity offense and accordingly the commission had no discretion to exercise but was required by the ordinance to deny him a license. Thus, as applied to Perrine, the ordinance was not void for lack of standards.[1]

The majority also hold that a municipality is without authority to deny a bookstore license to one previously convicted of certain crimes, including the distribution of obscene materials. It seems evident to me, however, that such authority derives from the general police power to preserve, promote and protect the public health, safety, morals and general welfare.

In his own words, James Perrine "learned the business of selling adult material" while working in and operating a San Francisco bookstore and motion picture arcade; subsequently, he acquired his own bookstore, "The Citadel" in Los Angeles. On July 11, 1969, Perrine was convicted for distributing obscene material (Pen. Code, § 311.2). Following the adoption of the ordinance in question, he applied for a license to operate The Citadel and another bookstore, The Arena, also in Los Angeles. He also sought a license for a picture arcade at The Citadel.

The majority confidently state that "We cannot assume that because petitioner was once convicted of violating Penal Code section 311.2, he will violate it again. . . ." To the contrary, I think it reasonably likely that he will. An advertisement for The Citadel bookstore, in the August 1970 Los Angeles Telephone Directory (Yellow Pages), page 352, openly announces: "Erotic Action—Underground Literature—Adults Only . . . Paperbacks, Magazines, Stag Films. . . ."[2] But even without considering the foregoing evidence, the commission properly denied Perrine a license to operate a bookstore.

The rule is clear that a municipality may impose reasonable restrictions upon the conduct of an economic enterprise, including the requirement

[1]Our opinion in *Burton* v. *Municipal Court*, 68 Cal.2d 684 [68 Cal.Rptr. 721, 441 P.2d 281], would not preclude us from upholding at least that portion of the ordinance which applied to persons, such as Perrine, who had previously been convicted of an obscenity offense. In *Burton*, we noted that an ordinance failing to meet the required criteria is unenforceable "even though the defendant's conduct may have run afoul of a statute *which could have been adopted* in satisfaction of those criteria." (Italics added; p. 696.) In the instant case, the ordinance *did* contain a properly objective standard for denying a license (prior obscenity conviction); moreover, the ordinance contained a broad severability clause. Therefore, since the evidence is uncontradicted that the commission in fact denied Perrine a license for the sole reason of his prior offense, the ordinance was valid as applied to him.

[2]We may take judicial notice of petitioner's advertisement under Evidence Code section 452, subdivision (h).

that a license to operate be obtained. "That First Amendment rights are being utilized on the premises does not exempt a commercial entrepreneur from compliance with reasonable regulations under the police power. The requirement that a license be obtained as a condition of engaging in the . . . business is a reasonable means of assuring compliance with police power regulations." (*Burton* v. *Municipal Court, supra,* 68 Cal.2d 684, 690.) In *Burton,* this court struck down as overly broad an ordinance which permitted the licensing agency to refuse a license to a motion picture exhibitor "who has in the past shown motion pictures *admittedly not obscene* because he has failed to demonstrate to its satisfaction that the pictures he has exhibited are in 'good taste,' because a vocal segment of the community objects to them and because, in the board's unfettered judgment, the operation of the theater, showing film with 'immoral characteristics' is not 'compatible' with a 'better and healthier community.' " (Italics added; p. 695.)

Had the ordinance in *Burton* had more precise standards and had it authorized the agency to refuse to grant or renew a license for an exhibitor previously convicted for showing *obscene* films, the result reached in that case might well have been different. *Burton* expressly recognized the validity of regulations "specifically drawn to meet a proper public purpose, such as compelling the theater building to satisfy health, fire and safety laws, *or requiring the operation of the business to comply with the law in other specific respects.* . . ." (Italics added; p. 696.) Thus, *Burton* does support the position that a failure to comply with state law could constitute a proper ground for denial of a commercial license, whether or not First Amendment rights are thereby affected. Indeed, it has long been held that a municipality may properly deny a business or professional license to one convicted of a crime bearing a reasonable relation to the nature of the operations sought to be licensed, on the theory that such prior offense is evidence of the applicant's unfitness to engage therein. (*Hawker* v. *New York,* 170 U.S. 189 [42 L.Ed. 1002]; *Hollingsworth* v. *Board of Medical Examiners,* 188 Cal.App.2d 172 [10 Cal.Rptr. 343]; see *Morrison* v. *State Board of Education,* 1 Cal.3d 214, 220-230 [82 Cal.Rptr. 175, 461 P.2d 375].)

Promotion of public morality is a legitimate aspect of the police power. (See *Near* v. *Minnesota,* 283 U.S. 697, 707 [75 L.Ed. 1357, 1362, 51 S.Ct. 625]; *Eye Dog Foundation* v. *State Board of Guide Dogs for the Blind,* 67 Cal.2d 536, 548 [63 Cal.Rptr. 21, 432 P.2d 717]; 11 Cal.Jur.2d, Constitutional Law, §§ 159, 168, and cases cited.) The owner-operator of a bookstore is in daily contact with the public, including the impressionable young, and we have recently acknowledged that public distribution

of obscene materials poses sufficient dangers to the public morality to support governmental regulation thereof. (*People* v. *Luros*, 4 Cal.3d 84, 91-93 [92 Cal.Rptr. 833, 480 P.2d 633].) A municipality should not be required to rely exclusively upon the operation and enforcement of state obscenity laws (which have, for a variety of reasons, proven somewhat ineffective in this state) in controlling the distribution of obscene material.[3] A prior conviction of an obscenity offense furnishes a reasonable basis for concluding that an applicant such as Perrine will repeat the offense.[4]

I would deny the writ of prohibition.

McComb, J., concurred.

[3]*Near* v. *Minnesota*, *supra*, 283 U.S. 697, cited by the majority, does not compel a contrary conclusion. In *Near*, the offending ordinance permitted public officials to take legal proceedings against the owner or publisher of a newspaper upon a charge of publishing scandalous and defamatory matter, and to obtain an order suppressing further publication of the newspaper. The ordinance was not restricted to persons *convicted* of obscenity offenses, but extended to persons *charged* with promoting scandal and libel. (See p. 713 [75 L.Ed. p. 1366].) Moreover, the ordinance in *Near* operated as a prior restraint upon the publication of a newspaper; its effect upon the dissemination of ideas was direct and substantial. On the other hand, the instant ordinance does not restrain publication or distribution of any particular book or magazine; it simply denies those persons convicted of certain criminal offenses a license to operate a bookstore.

[4]The majority's statement to the contrary does not, I trust, indicate that they would also invalidate a properly drawn license *revocation* ordinance which provided that a bookstore or other license could be revoked in the event that subsequent obscenity offenses occurred. Such ordinances may ultimately become instrumental in inhibiting the distribution of obscene materials, and yet their rationale (like that underlying the license ordinance herein) must be that conviction of a prior obscenity offense renders the distributor unfit to operate a bookstore, i.e., his conviction affords a reasonable basis for concluding that he will commit further offenses.

MEMORANDUM CASE

[L.A. No. 29860. In Bank. Sept. 3, 1971.]

JOANNE L. BAKER et al., Petitioners, v.
THE MUNICIPAL COURT FOR THE EAST LOS ANGELES JUDICIAL DISTRICT OF LOS ANGELES COUNTY et al., Respondents;
THE PEOPLE, Real Party in Interest.

SUMMARY

Petitioners sought writs of prohibition to restrain further criminal proceedings in actions charging them with operating bookstores without the license required by Los Angeles County Ordinance 5860, § 321. On the basis that the ordinance had been held unconstitutional in Perrine v. Municipal Court, supra, p. ——, and that the trial courts were, therefore, without jurisdiction of the actions, the Supreme Court issued the writs. (Opinion by Wright, C. J., with Peters, Tobriner, Mosk, and Sullivan, JJ., concurring. Separate dissenting opinion by Burke, J., with McComb, J., concurring therein.)

COUNSEL

Mervyn L. Hecht and Roger Jon Diamond for Petitioners.
John D. Maharg, County Counsel, and Edward H. Gaylord, Assistant County Counsel, for Respondents.

No appearance for Real Party in Interest.

OPINION

WRIGHT, C. J.—Petitioners, the operators of several Los Angeles County bookstores, are charged with violating Los Angeles County Ordinance 5860, section 321, which prohibits the operation of a bookstore without securing a license from the Los Angeles County Welfare Commission. Petitioners seek writs of prohibition to restrain the respondent courts from taking further proceedings in criminal actions charging them with violations of the ordinance. Since the ordinance is unconstitutional on its face (*Perrine v. Municipal Court, ante,* p. 656 [—— Cal.Rptr. ——, —— P.2d ——]) the respondent courts lack jurisdiction of the criminal proceedings against petitioners.

Let peremptory writs of prohibition issue as prayed for.

Peters, J., Tobriner, J., Mosk, J., and Sullivan, J., concurred.

BURKE, J.—I dissent. For the reasons stated in my dissenting opinion in *Perrine v. Municipal Court, ante,* p. 656 [—— Cal.Rptr. ——, —— P.2d ——], it is my view that the ordinance in question is valid as applied to applicant licensees who have suffered prior convictions for obscenity offenses.

McComb, J., concurred.

10844 VENTURA BLVD.,
POPLAR 3-2965

NORTH HOLLYWOOD
TRIANGLE 7-8620